JOHN T. FEY, Clerk

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,500

RUTH ELKHORN COALS, INC., ET AL.,
Appellants

v.

JAMES P. MITCHELL,
SECRETARY OF LABOR,
Appellee

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the
District of Columbia Circuit
FILED DEC 3 1 1958

INDEX

	Appendix Page
Letter to Honorable James P. Mitchell from John L. Lewis, George H. Love, A. R. Matthews dated December 15, 1954	1
Notice of Public Hearing on the Determination of the Prevailing Minimum Wages for the Bituminous Coal Industry	2
Letter to Honorable James P. Mitchell from Wallace M. Cohen dated April 22, 1955	5
Letter to Wallace M. Cohen from the Secretary of Labor dated May 9, 1955	6
Letter to Honorable James P. Mitchell from Wallace M. Cohen dated May 23, 1955	6
Letter from Acting Secretary of Labor to Wallace M. Cohen	8
Notice of Proposed Determination of Prevailing Minimum Wages for Bituminous Coal Industry	9
Determination of Prevailing Minimum Wages	45
Complaint for Declaratory Judgment and Injunctive Relief	60
Amendment to Complaint for Declaratory Judgment and Injunctive Relief	73
Request for Admission Under Rule 36	76
Defendant's Answer to Plaintiffs' Request for Admission	77
Answer	79
Order filed May 23, 1955	85
Motion for Hearing on Jurisdiction of Secretary of Labor	86
Affidavit of Frank Bassham	86c
UMW Exhibit 8-A	86d
UMW Exhibit 8-D	87
UMW Exhibit 7	90

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	Appendix Page
UMW Exhibit 5	90
UMW Exhibit 3	91
UMW Exhibit 2	93
UMW Exhibit 1	94
Notice of Appeal to the United States Court of Appeals for the District of Columbia Circuit filed July 19, 1955	95
Order Dismissing Appeal with Respect to Plaintiff Stearns Coal and Lumber Company	95

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Witnesses:

John L. Lewis	
Direct	99
Cross	101
W. A. Boyle	
Direct	103
John Owens	
Direct	107
W. A. Boyle	
Cross	109
John Owens	
Cross	110
George A. Lamb	
Direct	121
Hugh R. Hawthorne	
Direct	123
Cross	124
J. O. Archer	
Direct	127
S. P. Hutchinson	
Direct	128
Preston H. Haskell	
Direct	129
Cross	129

	Appendix Page
William C. Southern	
Direct	133
Cross	139
Redirect	147
Recross	148
H. Claude Pobst	
Direct	149
Cross	151
T. G. Shufflebarger	
Direct	152
Cross	154
O. L. Gibson	
Direct	162
Cross	162
J. P. Shockey	
Direct	163
Cross	171
Robert L. Stearns, Jr.	
Cross	174
B. W. Deringer	
Direct	178
Cross	180
George A. Lamb	180
Paul Fahey	
Direct	184
George A. Lamb	
Cross	185
W. A. Boyle	
Direct	185
Cross	188

PLEADINGS AND DOCUMENTARY EVIDENCE

December 15, 1954

Honorable James P. Mitchell
Secretary of Labor
Washington 25, D.C.

Dear Secretary Mitchell:

As you know, the Walsh-Healey Act has been in effect for some eighteen years and during that period no minimum wage determination applicable to any part of the coal industry has been made. Because of this we are very much interested in having an appropriate minimum wage rate determined for the bituminous coal industry and, accordingly, we request that a prevailing minimum wage determination for the bituminous coal industry be made under the Act.

Sincerely yours,

/s/ John L. Lewis

President
United Mine Workers

/s/ George H. Love

President
Pittsburgh Consolidation
Coal Company

/s/ A. R. Matthews

President
Pocahontas Fuel Company, Inc.

1/1/55

UNITED STATES DEPARTMENT OF LABOR

TITLE 41 - PUBLIC CONTRACTS

PART 202 - MINIMUM WAGE DETERMINATIONS

NOTICE OF PUBLIC HEARING ON THE DETERMINATION OF THE PREVAILING MINIMUM WAGES FOR THE BITUMINOUS COAL INDUSTRY

This matter is before the Department pursuant to the Act of June 30, 1936 (40 Stat. 2036; 41 U.S.C. 35) as amended by the Defense Production Act Amendments of 1952, (Sec. 310, P.L. 429, 82nd Congress), entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," and known as the Walsh-Healey Public Contracts Act.

The United Mine Workers, the Pittsburgh Consolidation Coal Company, and the Pocahontas Fuel Company submitted a petition dated December 15, 1954 for the determination of prevailing minimum wages for persons employed in the Bituminous Coal Industry in the performance of contracts with agencies of the United States Government subject to the Act.

The petitioners contend that the minimum wages predominantly paid in each area, computed on a portal-to-portal basis, are as follows:

(1) Area A - $2.245 per hour, in the area consisting of the states of Pennsylvania, Michigan, Ohio, Maryland, West Virginia, Virginia, Tennessee except the counties listed in Area D, Illinois, and Kentucky except the counties listed in Area C.

(2) Area B - $2.28 per hour in the area consisting of the state of Indiana.

(3) Area C - $2.09 per hour in the area consisting of the following counties in Western Kentucky: Butler, Christian,

Crittenden, Daviess, Hancock, Henderson, Hopkins, Logan, McLean, Muhlenberg, Ohio, Simpson, Todd, Union, Warren and Webster.

(4) Area D - $2.015 per hour in the area consisting of the state of Alabama and the following counties in Southern Tennessee: Bledsoe, Grundy, Hamilton, Marion, McMinn, Rhea, Sequatchie, Van Buren, Warren and White.

(5) Area E - $2.09 per hour in the area consisting of the states of Arkansas, Iowa, Kansas, Missouri, and Oklahoma.

(6) Area F - $2.296 per hour in the area consisting of the states of Colorado and New Mexico.

(7) Area G - $2.226 per hour in the area consisting of the state of North Dakota.

(8) Area H - $2.346 per hour in the area consisting of the state of Montana.

(9) Area I - $2.32 per hour in the area consisting of the states of Utah and Wyoming.

(10) Area J - $2.235 per hour in the area consisting of the state of Washington.

It is proposed by petitioners that the Bituminous Coal Industry be defined as that industry which produces or furnishes all coal except Pennsylvania anthracite.

NOW, THEREFORE, NOTICE IS HEREBY GIVEN: That a public hearing will be held on Tuesday, February 1, 1955 at 10:00 A.M., Archives Auditorium, 8th Street and Pennsylvania Avenue; N.W., Washington, D.C., before the Secretary of Labor or a duly assigned Hearing Examiner, at which hearing all interested persons may appear and submit data, views and argument (1) as to what are the prevailing minimum wages in the Bituminous Coal Industry; (2) as to the propriety of the proposed definition of this Industry; and (3) as to whether a single determination applicable for all of the area in which the Industry operates, or a separate determination for each of several different

smaller geographical areas (including the appropriate limits of such areas), should be determined for this Industry.

Persons intending to appear are requested to notify the Administrator of the Wage and Hour and Public Contracts Division of their intention in advance of the hearing. Written statements in lieu of personal appearance may be filed by mail with the Administrator at any time prior to the date of the hearing, or may be filed with the presiding officer at the hearing. An original and four copies of any such statement should be filed.

The following information is particularly invited with respect to the subject matter of the testimony or statements of each witness: (1) the number of workers covered in the presentation; (2) the number and location of establishments and annual tonnage of coal produced; (3) minimum wages paid and the number of workers receiving such wages and the occupations in which these workers are found; and (4) the extent to which there is competition in this industry between different plants in different geographical areas.

To the extent possible, data should be submitted in such a manner as to permit evaluation thereof on a plant by plant, or a company by company, basis.

/s/ Arthur Larson
Acting Secretary of Labor

Signed at Washington, D.C.,
this 30th day of December, 1954.

Published in Federal Register January 1, 1955

April 22, 1955.

Honorable James P. Mitchell
Secretary of Labor
Department of Labor
Washington, D.C.

Dear Sir:

Enclosed herewith is a petition signed by 305 bituminous coal operators in Virginia.

If the Walsh-Healey Act is legally applicable to the bituminous coal industry, the petitioners request that the prevailing minimum wage for the Virginia locality which they specify be determined to be $1.25 per hour.

The petitioners are prepared to present evidence to the Secretary establishing that the Virginia locality contended for is an appropriate locality within the meaning of the Walsh-Healey Act and that the prevailing minimum wage for such locality is $1.25 per hour.

For your convenience, we have attached to the petition a typewritten list of the petitioners.

We request that this matter be set down for hearing at your earliest convenience.

Respectfully submitted,

Landis, Cohen, Rubin and
Schwartz

By
Wallace M. Cohen

Enclosure

cc: Fred B. Greear, Esq.
T. G. Shufflebarger
H. Claude Pobst

U. S. DEPARTMENT OF LABOR
Office of the Secretary
WASHINGTON

May 9, 1955

Wallace M. Cohen, Esq.
Landis, Cohen, Rubin & Schwartz
1832 Jefferson Place, N.W.
Washington, D. C.

Dear Mr. Cohen:

This is in reply to your letter of April 22, 1955, transmitting a petition on behalf of a number of Virginia coal operators. A hearing is requested for the purpose of establishing that the Virginia locality contended for is an appropriate locality within the meaning of the Walsh-Healey Act and that the prevailing minimum wage for such locality is $1.25 an hour.

Since the wage practices of Virginia operators were extensively dealt with at the public hearing held in February, 1955 in the matter of the determination of the prevailing minimum wages in the bituminous coal industry, and no reason appears why an additional hearing should be granted, I have no alternative but to deny your request.

You are aware, of course, that you will have an opportunity to submit your comments with respect to any proposed order which may be issued as a result of the recent hearing.

Sincerely yours,
Secretary of Labor

May 23, 1955

Honorable James P. Mitchell
Secretary of Labor
U. S. Department of Labor
Washington, D. C.

My dear Mr. Secretary:

This is in reply to your letter of May 9, 1955, in which you deny the request of certain Virginia coal operators that a hearing be held for

the purpose of establishing the Virginia locality as an appropriate locality within the meaning of the Walsh-Healey Act, and that the prevailing minimum wage for such locality be determined to be $1.25 per hour. You state that the "wage practices of Virginia operators were extensively dealt with at the public hearing" and "no reason appears why an additional hearing should be granted".

We respectfully call your attention to the fact that "the wage practices" could not have been "extensively dealt with" since the notice of the public hearing was inadequate both in its content and in the time permitted the Virginia operators to make a full and complete presentation. The opponents of the petition were hard-pressed in the time allotted them to assemble and correlate sufficient information to meet contentions which were raised by the petitioners for the first time at the hearing and without notice to the opponents. The Virginia operators had little opportunity to present affirmatively their position as to the appropriate locality since they were not given adequate time to consider the matter and to gather relevant data. No evidence was adduced by the Government or the petitioners which could relate the geographical boundaries of appropriate localities to such evidence as was introduced concerning prevailing minimum wages. Without such evidence it seems to us that you are helpless to make any finding at all. Hence, we are suggesting an entirely new proceeding, completely distinct from the hearings just concluded, dealing with entirely new matters relating to locality, for the purpose of squaring the provisions of the law with the realities of the situation.

We feel that, at the very least, we should have been given an opportunity to make an oral presentation to you of our reasons for our petition and for requesting a hearing. We seriously doubt that you granted the petition in the pending case without prior consultation with representatives of the petitioners. We can see no important reasons of policy or any other overriding considerations which would appear to justify your treatment of the Virginia operators in a different fashion and thus discriminating against an important segment of the coal industry. If, however, you nevertheless feel that our petition is so closely

related to the pending proceeding that policy dictates that you should not even accord us the privilege of presenting our views, we desire to make the following requests:

1. That you include our petition and this letter as a part of the record in the pending proceeding, despite the fact that the record is closed; and

2. That you take judicial notice in the pending proceeding of the records of the Wage and Hour Division of the Department of Labor which will disclose that in the Virginia locality many of the operators having agreements with the United Mine Workers of America are paying their employees less than the wages provided for in those agreements and that, therefore, the prevailing minimum wage for UMWA operators in the Virginia locality is not the wage provided for in UMWA contracts and contended for by the petitioners.

Respectfully submitted,

Landis, Cohen, Rubin and Schwartz

By Wallace M. Cohen

U.S. DEPARTMENT OF LABOR
Office of the Secretary
WASHINGTON

Wallace M. Cohen, Esquire
Landis, Cohen, Rubin and Schwartz
1832 Jefferson Place, N.W.
Washington 6, D. C.

Dear Mr. Cohen:

This is in reply to your letter of May 23, 1955, concerning the request of certain Virginia coal operators that a hearing be held for the purpose of establishing the Virginia area as an appropriate locality within the meaning of the Walsh-Healey Public Contracts Act.

I have noted your comments with respect to the adequacy of advance notice of the recently concluded public hearing at which evidence

was presented on the wage practices of Virginia coal operators. The same arguments were previously presented at the hearing and in your brief filed as a part of the record of the proceeding. A decision is now pending on this and other issues raised at the hearing. Until such time as a decision on these matters is made, I do not feel that oral discussion of the issues with individual interested parties would be appropriate.

I shall, however, include your petition and letter as an addition to the brief previously filed by you for the record. Consideration will also be given in the decision to your request that official notice be taken of the contents of the inspection records of the Wage and Hour and Public Contracts Divisions.

Sincerely yours,
/s/ Arthur Larson
Acting Secretary of Labor

[Filed Aug. 6, 1955, Dept. of Labor] D-619

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UNITED STATES DEPARTMENT OF LABOR
DIVISION OF PUBLIC CONTRACTS
WASHINGTON, D. C.
(41 CFR, PART 202)

BITUMINOUS COAL INDUSTRY

Notice of Proposed Determination of Prevailing Minimum Wages For Bituminous Coal Industry

This matter is before the Department pursuant to the Act of June 30, 1936, as amended (49 Stat. 2036; 41 U.S.C. sec. 35 et seq.), entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States and for other purposes," and known as the Walsh-Healey Public Contracts Act. It arises upon the petition of the United Mine Workers of America (hereinafter referred to as UMWA), the Pittsburgh Consolidation Coal Company, and the Pocahontas Fuel Company (all three hereinafter referred to as petitioners), dated December 15, 1954, for the determination of prevailing minimum

wages for persons employed in the Bituminous Coal Industry in the performance of contracts subject to the Act.

Petitioners requested the determination of minimum wages varying from $2.015 to $2.346 per hour for ten separate geographical areas. They also urged that the Industry be defined as that industry which produces or furnishes all coal except Pennsylvania anthracite.

General

Notice of a hearing in this matter to be held February 1, 1955 was published in the Federal Register on January 1, 1955. [1] A copy of the notice was contained in a press release issued on December 30, 1954.

This notice and release advised interested persons of the time and place at which they could appear and offer testimony: (1) as to what are the prevailing minimum wages in the Bituminous Coal Industry; (2) as to the propriety of the proposed definition of this Industry; and (3) as to whether a single determination applicable for all of the areas in which the Industry operates, or a separate determination for each of several different smaller geographical areas (including the appropriate limits of such areas), should be determined for this Industry. The notice particularly invited information with respect to the subject matter of the testimony as to (1) the number of workers covered in the presentation; (2) the numbers and location of establishments and annual tonnage of coal produced; (3) minimum wages paid and the number of workers receiving such wages and the occupations in which these workers are found; and (4) the extent to which there is competition in this Industry between different plants in different geographical areas. The notice also stated that "To the extent possible, data should be submitted in such a manner as to permit evaluation thereof on a plant by plant basis."

Pursuant to the notice, a hearing was held beginning February 1, 1955 at Washington, D. C. The hearing was concluded on February 26,
Tr 2 1955. The record remained open until April 29, 1955 to permit the filing

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1/ 20 F.R. 5

of additional material and briefs. Representatives of employees and employers appeared at the hearing to present evidence and testimony. In addition to the petitioners, coal companies and associations from Virginia, Pennsylvania, Kentucky, Tennessee, Alabama, Indiana, Colorado and Illinois were represented at the hearing. The Honorable Carl Elliot appeared and offered testimony on behalf of the Seventh Congressional District of Alabama. The Department of Labor presented evidence with respect to Government coal procurement practices.

At the hearing and in briefs filed subsequent to the hearing, various legal objections were raised with respect to this proceeding.

"Open Market" Exemption

It has been asserted that I have no jurisdiction to fix a minimum wage applicable to the Bituminous Coal Industry because contracts for the purchase of bituminous coal are exempt from the Act's requirements. This assertion is grounded on a challenge of the Department's interpretation that the "open market" purchase exemption contained in Section 9 of the Act applies only:

> "Where the contracting officer is authorized by the express language of a statute to purchase 'in the open market,' or where a purchase of articles, supplies, materials, or equipment either in being or virtually so, is made without advertising for bids under circumstances bringing such purchases within the exemption to the General Purchase Statute, R.S. 3709, that is, where immediate delivery is required by public exigency." (Section 201.2(a), General Regulations under the Walsh-Healey Public Contracts Act, 41 CFR 201.2(a).)

I do not consider this matter properly raised in this proceeding. The purpose of the hearing was to determine the terms of the wage stipulation in those Government procurement contracts for bituminous coal subject to the Act. The notice of hearing did not undertake to place in issue the question of whether particular contracts might be exempt from the requirements of the Act by force of the "open market" or any other exemption. This issue can only be decided on a case by

case basis, depending on the terms and circumstances of particular contracts.

Procedural Objections

Irregularities in the administrative proceedings have been alleged which are asserted as grounds for preventing a valid determination on the present record. They consist of alleged insufficient advance notice of hearing and insufficiency of the notice itself.

The first public announcement that proceedings to make a determination would be instituted were contained in a press release issued on December 17, 1954. [2] On December 30, 1954 a second release was issued announcing a hearing to be held in Washington, D. C. on February 1, 1955. [3] The notice of hearing was published in the Federal Register on January 1, 1955. When the hearing convened on February 1, various parties for the first time requested that the hearing be postponed. [4] Notwithstanding that this request was not timely made, the Hearing Officer suspended the hearings on February 4, 1955 for 10 days in order to grant further time for various parties to prepare their cases. [5] The hearing was not concluded until February 26, ten weeks after the notice was issued.

That ample time and full opportunity were given all interested parties to gather and present relevant data is clearly demonstrated by the extensive presentations of the very parties who object to the adequacy of advance notice. Of the nearly 2000-page transcript of testimony, an extensive portion is devoted to the presentation of direct evidence and cross-examination by these parties. They asked for and were granted additional time to gather statistical data and did in fact submit such data for consideration. Under these circumstances, their contention of insufficient advance notice is without merit.

With respect to the sufficiency of the notice itself, it is asserted

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2/ T. 1794
3/ Government Exhibit 3
4/ T. 11
5/ T. 448

that interested parties were not fairly apprised of the issues involved so that they might present relevant data or argument.

Although objection to the sufficiency of notice is allegedly based upon the requirements of Section 4(a) of the Administrative Procedure Act (5 U.S.C. 1003(a)) with respect to rule-making, many of the supporting arguments are more appropriate to an adjudicatory proceeding. It is argued that parties opposing a determination were hampered in preparing their cases because they were not given advance notice as to the exact position parties favoring a wage determination would take at the hearing and the nature and amount of evidence these parties would present.

Under Section 4(a) of the Administrative Procedure Act, the notice of hearing is required to set forth "*** either the terms or substance of the proposed rule or a discussion of the subject and such issues involved."

The subject matter of the proposed rule-making is plainly described in the notice as "the determination of the prevailing minimum wage for the Bituminous Coal Industry." The basic issues are clearly set forth as what the prevailing wages in the Industry are, the propriety of the proposed definition of the Industry, and whether separate determinations should be made for different geographic areas and the appropriate limits of such areas. Certainly the notice "sufficiently alerted" interested parties that any "data, views, and argument" pertinent to the determination would be considered. See City of Dallas v. Civil Aeronautics Board, 221 F. 2d 501.

Nothing in the Administrative Procedure Act contemplates that the notice mention the details of the evidence which will be introduced. Particularly in rule-making, as distinguished from adjudication, some generality in the notice is necessary. Since the Walsh-Healey Act directs the Secretary of Labor to determine the prevailing minimum wages "on the record after an opportunity for a hearing" it would, indeed, be inconsistent with the statutory direction to attempt to give a detailed specification in the advance notice, of every consideration that might

have a bearing on the determination.

Under Section 4 of the Administrative Procedure Act, all interested parties were entitled to notice of "a description of the subjects and issues involved" in the proceeding, and such notice was given.
Tr 4 The fact that the notice went beyond this requirement and also set forth the general position that certain parties would take at the hearing can hardly be considered as having prejudiced those opposing the determination in preparation of their own cases.

* * * * * * *

Tr 6 Basis of Determination

Section 1(b) of the Walsh-Healey Act authorizes the Secretary of Labor to determine the prevailing minimum wages on either one or more of three bases: For persons employed (1) "on similar work," or (2) "in the particular or similar industries" or (3) in "groups of industries currently operating in the locality in which the materials, supplies, articles or equipment are to be manufactured or furnished under said contract." The notice of hearing in this case called for data as to the prevailing minimum wages in the "particular" industry that produces or furnishes bituminous coal.

In the context of the Act it seems proper to conclude that the phrase "currently operating in the locality" was intended to qualify only groups of industries and does not limit "similar work" or "particular or similar industries." Thus, where a determination, as in the instant case, is made on the basis of the particular industry, there is no requirement in the Act itself that the determination be made on other than an industry-wide basis. Where, however, competitive and other economic factors are such that an industry-wide determination is not required or appropriate to carry out the purposes of the Act, wage determinations have been made which recognize area breakdowns of particular industries.

Appropriate Geographic Areas for a Determination

Approximately 456 million tons of bituminous coal were mined in the continental United States in 1953 and about 391 million tons in

1954. [12] The Industry is widely distributed, following commercial coal deposits. Producing states in 1953 and 1954 ranged from the Gulf of
Tr 7 Mexico to the Great Lakes and the Canadian border and from the Atlantic to the Pacific. However, the bulk of production is concentrated in the Appalachian area, with very substantial production also in Illinois, Indiana, Ohio, western Kentucky and Colorado, and with smaller amounts of production reported in each year for 14 other states.

Bituminous coal deposits vary widely in character as to volatility, ash, sulphur and moisture content, and other properties that affect the desirability of coal for particular uses. Bituminous coal is notably bulky, with transportation costs in consequence strongly affecting the marketing patterns of the industry.

In order to obtain information to assist in the evaluation of these marketing patterns with relation to Government procurement of coal, the Department obtained for the record detailed information on contractors and on unsuccessful bidders from each of the most important coal-purchasing agencies. [13] These data cover 156 installations scattered throughout the entire country and account for about 90 percent of total Government coal purchases during the period covered. These data clearly indicate that mines do not have nation-wide distribution, but instead have limited coal distribution areas.

It is clear, for example, that lignite produced in North Dakota does not compete with the higher quality coals of Illinois and that transportation costs prevent competition between coals mined in the Rocky Mountain and in the Appalachian areas. Even in the case of more nearly adjacent areas, competition is often sharply limited in extent. The data with respect to Government purchases indicate, for example, that competition of Iowa producers for Government business is limited to installations within that State. [13]

All of the natural factors affecting the ability of coals to compete,

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[12] Government Exhibit 7; Virginia Operators Exhibit 11

[13] Government Exhibits 9 and 10

as well as freight rates and transportation costs, vary widely between adjacent coal producing regions. The record clearly indicates, for example, that the higher quality of coal produced in East Kentucky is a decisive factor in its ability to compete with lower quality West Kentucky coal. 14/ Lower productivity of Alabama mines because of rock partings and impurities in the seams limits the effectiveness with which mines in this area can compete with nearby producing areas. The record shows, on the other hand, that in the case of one TVA installation, the lower quality of West Kentucky coal precludes it from competing with Alabama coal in spite of West Kentucky's better mining conditions. 15/ The record also clearly demonstrates that in the case of TVA installations, variations in freight rates limit the number of nearby producing areas which can effectively compete for such purchases. 16/ On the other hand, coals produced in Virginia move to Ohio and in spite of the cost of shipment are able to compete with coals mined in Ohio, the freight disadvantage being offset by the higher quality of Virginia coal. 17/

It is thus evident that the production and marketing practices in this extractive industry are not characterized by industry-wide patterns or uniformities. There are definitely regional differences in the predominant characteristics of the coal industry.

Tr 8 It is also significant that no one appearing at the hearing suggested that a determination of prevailing minimum wages on an industry-wide basis would be appropriate for this Industry. In fact, the largest area proposed by any of the interested parties at the hearing was limited to an area which includes six producing states and portions of two others. 18/

I find, therefore, that in view of the unique natural, economic, and historic characteristics of the Bituminous Coal Industry, it would be

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14/ T. 1197, Government Exhibit 11(d)
15/ T. 652, 668, 691, 692
16/ T. 672, 1082, Government Exhibit 11(d)
17/ T. 1154
18/ Government Exhibit 2

inappropriate and unnecessary to the accomplishment of the purpose of the Act, to determine prevailing minimum wages on an industry-wide basis in this case. I turn then to the question of what geographic areas are most appropriate for separate determinations. Several proposals were made at the hearing and I have considered each of these as well as other obvious geographic breakdowns of the Industry.

Five proposals were made at the hearing as to the appropriate areas for a minimum wage determination for the Industry. Four of these proposals were confined to the geographic areas of the parties making the proposals, and these areas are Virginia, part of Pennsylvania, and portions of Kentucky. A more general proposal was made by the UMWA, the Pittsburgh Consolidation Coal Company and the Pocahontas Fuel Company, petitioners in these proceedings, who proposed the 10 areas set forth below. These areas cover all but three or four producing states with very minor quantities of commercial coal production. [19] These proposals are discussed in more detail below.

In addition to these proposals, the record contains information as to other geographic classifications. Thus the comprehensive production statistics reported by the U. S. Bureau of Mines in Government Exhibit 7 show separate data for counties, for states, and for 23 numbered production districts (hereinafter referred to by number). The first two of these classifications are, of course, primarily political in character while the third is a grouping based upon economic factors. This grouping of production districts is widely known and used in the industry and in a variety of Federal laws and administrative regulations. There is also information in the record as to a further grouping of the country into 10 minimum price areas under the Bituminous Coal Act of 1937. [20]

Petitioners' Proposal

The petitioners for a minimum wage determination proposed the establishment of the following ten minimum wage areas: [21]

19/ Virginia Operators Exhibit 11; Government Exhibit 7
20/ T. 383
21/ Government Exhibit 1

A. Pennsylvania, Michigan, Ohio, Maryland, West Virginia, Virginia, Tennessee except the counties listed in D, Illinois, and Kentucky except counties listed in C.

B. Indiana.

C. Following counties in Western Kentucky: Butler, Christian, Crittenden, Daviess, Hancock, Henderson, Hopkins, Logan, McLean, Muhlenberg, Ohio, Simpson, Todd, Union, Warren, and Webster.

D. Alabama, and following counties in Southern Tennessee: Bledsoe, Grundy, Hamilton, Marion, McMinn, Rhea, Sequatchie, Van Buren, Warren, and White.

Tr 9 E. Arkansas, Iowa, Kansas, Missouri, and Oklahoma.

F. Colorado and New Mexico

G. North Dakota

H. Montana

I. Utah and Wyoming

J. Washington

It was contended that these areas represented natural competitive groupings of mines and that the recognition of this fact had led to the establishment of different wage patterns in the various areas through negotiations between the UMWA and the bituminous coal operators. The areas were said to represent the carefully considered judgment of both labor and management with respect to the necessity for wage differentials in an Industry characterized by a delicate balance of competition. 22/

However, the description of these areas as competitive entities is open to considerable doubt in some cases. Thus, the testimony of both the petitioners and their opposition indicated that there was little or no competition between certain parts of Area A, which is by far the most important area proposed by the petitioners, accounting for about

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22/ T. 22, 36-7, 80-1, 83, 84

four-fifths of the bituminous coal produced in the U.S. [23] The lack of substantial competition between various parts of Area A is also indicated by the data on Government purchases previously referred to. [24] Mines in Illinois, for example, competed with mines in only three of the other seven states included in Area A, and that competition was negligible. Similarly, the competition experienced by Iowa from other producing states in Area E was sharply limited in extent.

The record contains no evidence that some of the proposed areas, e.g., Areas A and E, have ever been used before, nor does the record show that there are any economic factors other than similar minimum wages which link Illinois, for example, to the remainder of the proposed Area A. [25]

Virginia

An organization representing a number of Virginia coal mine operators, hereinafter referred to as the Virginia Operators, argued that this state constituted an appropriate area for purposes of a minimum wage determination.

It was contended that the Industry in Virginia consisted predominantly of small, non-mechanized mines generally relying on trucks for transporting coal either to the nearest railhead or to the consumer. [26] The growth of these small "truck" mines was reported to be a relatively recent development in response to the difficulties encountered by the unionized section of the Industry in meeting the competition of fuels such as gas and oil. [27] The difficulties of the union mines were said to be due in considerable part to the exhaustion of many of the thicker seams in the state most adaptable to mechanization [28]

Tr 10 With the exhaustion of these seams, competitive pressures had

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23/ T. 388, 710-1; Virginia Operators Exhibit 11
24/ Government Exhibit 10
25/ T. 36-7, 80-1, 386-9, 401, 435-7
26/ T. 704-6, 714, 870, 891, 896-7, 936, 948, 997, 1031, 1071-3, 1079;
27/ T. 702-4, 889, 944, 1032-3, 1056-7 Virginia Operators Ex. 3.
28/ T. 704, 886-9, 1031-2, 1084-5, 1128

reportedly resulted in curtailed operations of union mines and in increased mechanization, with the result that discharged workers had been compelled to find employment in non-union mines. 29/

It was pointed out that the seams exploited by these truck mines were generally thin and not adaptable to exploitation by mechanical methods; consequently labor productivity was allegedly low, and if union wage rates were paid, production costs would be substantially higher than those of union mines. 30/ In addition, the quality of the coal was alleged to be frequently inferior with the result that prices were substantially lower than for coal produced by the large, mechanized mines. 31/ It was contended that these disadvantages could only be overcome by the payment of wages substantially below the union scale and as a result the minimum wage paid by the non-union section of the Industry was only $1.25 per hour compared with the $2.245 negotiated by the UMWA for this area. 32/

In addition, the proponents of a Virginia minimum wage area contended that mines in Virginia were principally in competition with one another rather than with mines outside the state. 33/

It would appear from the evidence in the record that the Virginia Operators are correct in their contention that the greater number of mines in Virginia are small, non-mechanized, non-union truck mines with wage rates substantially below union levels. 34/ However, it is also apparent that union mines accounted for a substantial majority of the state's total production in both 1953 and 1954. 35/ While it is also evident that union employment exceeded non-union employment in 1953,

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29/ T. 704-7, 891
30/ T. 705, 886-91, 948, 1031-2, 1123, 1127-30, 1151, 1154, 1157-8
31/ T. 898-9, 891
32/ T. 715, 871, 1123, 1157-8; Government Exhibit 2
33/ T. 1033-4
34/ Virginia Operators Exhibit 3; UMW Exhibit 8
35/ T. 184-5, 538, 731-2, 757, 913-8, 925-8, 1845-51; Virginia Operators Exhibits 3, 5, 11; UMW Exhibit 8; Government Ex. 7

there is conflicting evidence on this point for 1954. 36/

Although contending that Virginia mines competed primarily with one another, it was admitted by the Virginia Operators that there was substantial competition with other areas, such as West Virginia, east Kentucky, and northern Tennessee, and this was confirmed by other testimony. 37/ The extensive nature of the competition encountered by Virginia mines in competing for Government contracts is indicated by the tabulation of Government purchases introduced by the Government, showing the areas from which bids were submitted to the various purchasing installations. In all, Virginia mines submitted bids to 36 installations in 1954, but for 33 of these 36 installations more than half of the bids were received from mines outside of Virginia, and for 23 of these installations, over 75 percent of the total number of bids received came from mines in states other than Virginia. 38/ In the case of the Veterans Administration's installation at Chamblee, Georgia, for example, which
Tr 11 received a total of 25 bids, only five were submitted by Virginia mines, the remainder coming from west Kentucky, Tennessee, and Alabama. These figures clearly indicate the interstate nature of the competition encountered by Virginia and that mines in Virginia do not compete primarily with one another for Government business.

In general, Virginia, whose coal producing areas are included partly in District 7 and partly in District 8, encounters its most serious competition for Government contracts from other parts of these districts located outside Virginia, particularly from District 8. 39/ District 7 is a predominantly low-volatile coal area which extends into southeastern

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36/ T. 538-9, 553, 563, 718-9, 756, 761, 764, 809-10, 814, 835-8, 860, 879-80, 895-6, 903, 981-2, 986-9, 1071-3, 1079, 1821, 1845-51, 1907-13, 1970-2; Virginia Operators Exhibits 2 and 3; UMW Exhibit 8; Government Exhibit 7.

37/ T. 297, 312-3, 387, 537, 552-3, 710-1, 761, 935, 946, 976, 983, 1028-9, 1033-4, 1085-6, 1121, 1131, 1154.

38/ Government Exhibits 10 and 11.

39/ Government Exhibit 10.

r 11 West Virginia, while District 8, extending into southwestern West Virginia, eastern Kentucky and northeastern Tennessee, is a predominantly high-volatile coal area. [40] The low-volatile areas of Virginia are classified in District 7, while the high-volatile areas, accounting for the major part of Virginia's coal production, are included within District 8. [41] Both the low and high-volatile coals mined in Virginia compete with their counterparts in the remainder of Districts 7 and 8. [42] It should also be noted that many coal seams in Virginia extend into West Virginia and Kentucky, and individual mines are engaged in the extraction of coal from seams underlying one other state in addition to Virginia, with the mine portal being located in one state and actual mining operations being conducted in the other. [43] The record also indicates that the truck-mining operations described as characteristic of Virginia are also conducted in neighboring areas of West Virginia and Kentucky. [44] In view of these circumstances a minimum wage area delineated on the basis of the differentiating characteristics of Virginia would be required to encompass these areas as well.

It has also been requested that only that part of Virginia located in Production District 8 be considered a separate area for wage determination purposes. Most of the comments with respect to the entire State of Virginia are equally appropriate to this requested area.

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r 15 Counties

Data are available in the record as to production statistics for the 350 counties producing coal in 1953. [78] There is no evidence in the record that there has been any use of a county-by-county approach in any of the various laws and regulations which have dealt with the

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40/ T. 710, 984, 1029, 1131; Government Exhibit 8.
41/ T. 642, 760, 935, 946; Government Exhibit 8.
42/ T. 710-1, 761, 946.
43/ T. 454, 838-9, 913, 934-6, 947, 1005, 1052-4, 1066-7, 1121.
44/ T. 917, 934-5.

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78/ Government Exhibit 7.

Bituminous Coal Industry, nor is there any evidence that small areas have any significance in the industry except for statistical purposes. The data on bids and contracts of Government installations reveal that operators in particular counties generally account for a relatively small proportion of bids submitted to particular installations. [79]

States

I have also given consideration to use of a state-by-state approach in deciding on appropriate wage determination areas. The proposal for one State--Virginia--has been discussed above. Federal laws and regulations dealing with bituminous coal have relied on state boundaries to delimit coal producing areas only for certain states. The states have
Tr 16 been used by the U.S. Bureau of Mines and by the various state departments for statistical purposes and the states also have local laws and regulations dealing with mine safety. It is evident from the record that certain whole states or groupings of states are more appropriate for recognition as prevailing minimum wage areas than others. For example, the record indicates that competition of Iowa coal producers for Government business is substantially limited to installations within the State and that the only record of successful bidding from producers in other states for Iowa installations is for an installation on the border of the States on the Mississippi River. [80] Further, the record indicates that North Dakota mines encounter only limited competition from other mines for Government business. [80] However, in the case of a number of states such as Pennsylvania, West Virginia, Virginia, and Kentucky different types of coal are produced in different portions of the state. [81] Moreover, in a number of other cases, coal areas with substantially the same economic characteristics cross state lines. Reference has been made above to this situation in the case of Virginia, West Virginia, and Kentucky, and to Pennsylvania, Maryland and West Virginia.

79/ Government Exhibits 10 and 11.
80/ Government Exhibits 10 and 11
81/ T. 710-1, 1029, 1131, 1406-7, 1550, 1613, 1615.

Tr 17 Production Districts

There has been for many years a recognized division of the Bituminous Coal Industry into well-defined, precisely bounded, separate geographic areas known as production districts. The district boundaries have been developed in general along natural lines conforming to the characteristics of the Industry and the factors by which its operations are affected, rather than according to arbitrary or artificial geographic or political divisions. [82] These districts have had a long history as evidenced by the early formation of local associations representing mining fields within a given area with common production and marketing problems. [83] They have been recognized at least since the period of World War I and have been used in connection with Government regulations relating to coal mining. Wage rate structures have been related to these areas and Governmental recognition has been accorded to them in such matters as the setting of freight rates. [84] For purposes of establishing minimum prices for coal, the Bituminous Coal Act of 1937 recognized 23 production districts and 10 price areas, the latter being a combination of coal production districts. [85] This Act provided for a District Board for each of the 23 districts to recommend minimum prices for the coal produced in its district and to coordinate these prices in common consuming markets. With minor changes the same districts were also used in the earlier Bituminous Coal Act of 1935 [86] which, in addition to authorizing the establishment of minimum prices, authorized the establishment of minimum wages on a district basis.

During World War II the Office of Price Administration found the production districts to be appropriate geographic units for establishment of maximum prices for coal, and the districts were also used by the Solid Fuels Administration as a basis for allocating bituminous coal to consumers. Currently, the Bureau of Mines and the Bureau of Census

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82 T. 378, 380; Government Exhibit 8.
83 T. 375-80, 382
84 T. 376, 377
85 T. 377; Ch. 127, 50 Stat. 72
86 Ch. 824, 49 Stat. 991

collect and present a variety of economic statistics on this basis. [87]

The long-continued and widespread use of the district concept bears impressive witness to the significance of the districts as separately identifiable coal producing areas which are, in essence, distinguishable economic entities. The record clearly indicates the close relationship between the mines located in each of the various districts by virtue of such factors as the predominance of particular types of coal in the districts, similar mining conditions, uniform railroad freight rates to common destinations, and the sharing of common markets. [88] While there is also some overlapping competition between coals mined in different districts, the significance of the district as a competitive area is indicated by Government Exhibit 10 which shows that in the case of almost 90 percent of 156 Government installations purchasing coal in a recent period, at least half of the bids were submitted from mines located in the same district; and in 92 of these installations 65 percent or more of the bids came from mines located in the same district.

It is my conclusion that by virtue of their distinguishing common
18 features and long history as accepted separate economic areas, the production districts constitute a more appropriate basis for approaching the problem of setting up minimum wage areas than any other proposed geographic area or combination of areas. There remains for consideration the application of this approach in the light of the objectives of the Act.

The Public Contracts Act contemplates the elimination of competitive advantage accruing to firms bidding on Government contracts if the advantage is derived from the payment of wages which are below the prevailing minimum. As has been seen, the record clearly indicates the intensity of competition between mines within the same production district. There are also areas in which mines from more than one

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87/ T. 375-76, 378, 380; Government Exhibits 7 and 8.
88/ T. 376, 378-82, 537, 540, 1407, 1550, 1613, 1615.
89/ T. 378; Government Exhibit 11(d).

district are in competition. This overlapping competition between production districts is for the most part limited either to adjoining districts or districts adjoining common market areas. However, it raises the question whether, in order to carry out properly the purposes of the Act, various districts should be grouped together.

The economic characteristics of most industries for which wage determinations are issued are such that the minimum wage standard can be a controlling factor in determining competitive advantage among the bidders for a Government contract, irrespective of the location of their respective plants. In such situations, the end product is more or less standardized as to quality and other physical characteristics. Transportation costs comprise a relatively minor part of the cost of the end product and such other major costs of manufacture as raw materials and plant equipment are fixed at substantially the same level for all competitors. The cost of manufacture is thus more or less equalized with respect to major factors except wages. In the industries having these characteristics a comparatively slight variation in wage costs can operate to confer decisive competitive advantage, contrary to the purposes of the Act, unless a uniform wage floor is provided for all contractors from whom competing bids are received.

Variations in wage costs within the same production district in the coal industry might have the same decisive competitive effect. But the analogy is limited to the production districts, for the above-described equalization of other economic factors, which is a compelling reason in other industries for a uniform minimum wage standard among competing bidders, does not exist generally in the coal industry. Apart from the equalization that has been achieved historically by the production district, the coal industry is uniquely characterized by wide variations in natural and other economic factors. Transportation costs and freight rates vary widely. In some areas these costs comprise as much as 50 percent of delivered price.[89] They obviously become a significant factor in a

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89/ T. 378; Government Exhibit 11(d).

bidder's ability to compete for Government contracts. Natural physical factors are also responsible for wide variation in costs. 90/ Coal is purchased by the Government and its costs evaluated according to its heat producing qualities measured in BTU's. 91/ There is wide variation in the number of BTU's recoverable from coals produced in various production districts with the result that the value per ton of the end product differs. 92/ The ability of coal from a particular production district to compete with coals from other districts is governed by its relative position with respect to all of these varying factors in addition to wage costs. 93/

Tr 19

To the extent that there is overlapping competition between production districts for Government coal contracts, it seems clear that the ability to compete must rest on a balance of all these significant factors together with the wage rate structure in the competing districts. The record in this case shows a well-defined pattern of differentials existing between the minimum wages prevailing according to the production districts. As is discussed more fully elsewhere in this decision, the record establishes that in all districts in which coal is currently being produced except in District 12, the prevailing minimum wage corresponds to the minimum hourly rate under the terms of the UMWA agreements. According to the uncontroverted testimony of petitioners, the differentials in UMWA wage rates between different competing districts have historically taken into consideration all of the varying factors which affect the ability of mines in different districts to compete, so that the wage differentials would not be a controlling factor in competitive advantage. 94/ In such a situation, a determination of prevailing minimum wages on a

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90/ Government Exhibit 7.
91/ T. 1793, 1791, 1197.
92/ T. 1197, 1154-55; Government Exhibits 11(c) and (d).
93/ T. 1153-55.
94/ T. 22-23, 37, 80, 83, 291, 437. Production District 12, in which the prevailing minimum does not correspond to the UMWA hourly minimum, consists of all coal producing counties in the State of Iowa. As noted earlier, Iowa mines encounter only limited competition from other mines for Government business.

basis which would require readjustment of the prevailing district rates to a uniform wage floor for Government contracts would make no contribution to the elimination of depressant effects on wage levels which is a basic purpose of the minimum wage provisions of the Act.

After giving consideration to all relevant factors, including the conditions affecting operations in this Industry which have been discussed above, I find that it is not necessary or appropriate under the Act to determine prevailing minimum wages for any area larger or smaller than a production district, and that a separate wage determination for each production district will most effectively maintain a fair and reasonably balanced competitive situation and will carry out the purposes of the Act. 95/

Nature and Adequacy of Prevailing Wage Data

The most detailed and complete information in the record pertaining to wage rates paid to employees in the Industry was introduced by the UMWA. UMW Exhibits 8-A through 8-H are listings of bituminous coal mines stated by the union to be operating under contract with the UMWA
Tr 20 during the year 1953. The listings identify each mine by name and address, and for most mines give the tonnage produced and the number of workers employed during the year 1953. Those mines which are stated to have produced 1,000 tons or more of coal represented more than four-fifths of the Industry, accounting for an aggregate production of approximately 378 million tons, and employed a total of approximately 240,000

95/ The definitions of all but two production districts shall be the same as those contained in the Bituminous Coal Act of 1937. However, I am proposing to add to District 8, as defined in the Act, the following six counties in which bituminous coal was mined in 1953: Clinton, Menifee, Pulaski, and Wolfe Counties in Kentucky, and Pickett and Putnam Counties in Tennessee. For the same reason, McIntosh County in Oklahoma shall be added to the counties included in District 15 under the Act. This allocation follows the procedure of the U.S. Bureau of Mines in allocating these counties for statistical purposes to production districts on the basis of such factors as geographic propinquity and similar types of coal.

employees. 96/ A representative of UMWA testified that the information was obtained principally from three sources: (1) annual reports published by state mine bureaus; (2) Keystone Coal Buyers Manual and the annual supplement thereto; and (3) local UMWA offices. 97/ In those instances where data on tonnage or employment were unobtainable from any of those sources, no entries were made in Exhibits 8-A through 8-H beside the name and location of the mine.

UMW Exhibit 8-I contains the names of mines located in Arkansas, Iowa, Kansas, Missouri, and Oklahoma which are not under contract with the union, and therefore not listed UMW Exhibits 8-A through 8-H, but which were stated to compensate their employees at rates not less than those provided in the UMWA contract covering each of their respective areas.

Wage data were also offered in evidence by other proponents of the petitioners' request for the establishment of a prevailing minimum wage in the Bituminous Coal Industry. George A. Lamb Exhibit 5 contains wage information obtained from mines located in Iowa and accounting for a majority of that State's soft coal production during 1954. Mr. Lamb also named certain mines in New Mexico within the boundaries of District 18 which he stated pay rates not less than those called for in the union contract. 98/ These mines surveyed by Mr. Lamp represented the majority of tonnage and employment reported by all mines located in District 18. 99/ Mr. Lamb also submitted a list of mines located in Arkansas and Oklahoma, which he stated were paying wage rates not less than those called for in the UMWA contracts covering those states. 100/

96/ Government Exhibit 7.
97/ T. 45, 58, 62-3, 66, 148, 1879-80.
98/ T. 1718-20.
99/ T. 1718-9.
100/ T. 1724-7, 1795.

The UMWA introduced into the record a copy of the Appalachian Joint Wage Agreement, effective April 1, 1941, and all supplements thereto which have since been negotiated, including the currently effective agreement, The National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952. [101] In addition, UMW Exhibits 13-A through 13-S are copies of various UMWA district agreements entered into in 1941. Representatives of the union explained that no district agreements have been negotiated by the UMWA since 1941, and that all such agreements have been carried forward and amended by the national agreements which have been entered into since that date. [102] Furthermore, any provisions of the 1941 district agreements which are inconsistent with the provisions of the national agreements since negotiated are superseded thereby. [103] Consequently, a complete picture of the minimum wage rates currently called for in each of the district agreements in the record is obtainable by applying the wage adjustments provided for in the national agreements,
Tr 21 and the supplements thereto, to each of the district agreements. [104] It was also testified that the Progressive Mine Workers of America represented some workers in Illinois and that this organization claimed wage rates as high or higher than those negotiated by the UMWA. [105]

Wage data were also introduced by parties appearing in opposition to the petitioner's request. Such data were of a restricted nature, and pertained to workers employed in mines not under contract with UMWA in only four areas: (1) various coal producing counties in southwestern Virginia; (2) 21 counties in Central Pennsylvania; (3) Clay and Leslie Counties in eastern Kentucky; and (4) McCreary and Pulaski Counties and a portion of Whitley County, also in eastern Kentucky. The information submitted for each of these areas is as follows:

101 UMW Exhibits 1 through 7, and 12
102 T. 229, 242-3, 1844
103 T. 231, 243-5, 266-70, 1880
104 T. 229, 242-5, 1097, 1844, 1877
105 T. 239

(1) Virginia Operators Exhibit 10 is a partial list of coal mines operating in Virginia during the year 1954. The listing discloses for each coal company named therein the total number of employees, the number of employees receiving the lowest hourly wage, the number receiving the next lowest hourly wage, and the number of employees receiving over $1.35 an hour. This wage survey covered more than 400 mines employing approximately 6,100 men.[106] The witness appearing on behalf of the Virginia Operators concluded that the survey indicated a prevailing minimum hourly wage of $1.25 for soft coal mines in the State of Virginia.[107] The Virginia Operators also introduced a listing of mines operating in Virginia in 1954 and not under contract with the UMWA; these non-union mines reported a total employment of approximately 7,600.[108] Total production of non-union mines in Virginia during 1954 was estimated to be about 7 1/2 million tons.[109]

(2) Wage data were submitted covering 702 workers employed by non-union operators located within the 21 county area designated as the "Central Pennsylvania" area. The witness who introduced these data concluded that the survey disclosed an "average minimum" wage of $1.466 an hour. However, the producers covered by the wage survey employed only 11 percent of those employees not covered by the UMWA agreement.[110] The Central Pennsylvania Operators also introduced a listing of coal operators located within the 21 county area during the year 1953 which were not under contract with the UMWA.[111] This listing discloses the number of employees and the tonnage produced by each of the operators named therein as reported by the Pennsylvania Bureau of Mines. The data disclose that producers not under contract with the UMWA employed 61 percent of the workers and produced 71 percent of the tonnage of all coal producers operating in the 21 county area in 1953.

106 Virginia Operators Exhibits 3 and 5; T. 731-2
107 T. 715, 719
108 Virginia Operators Exhibit 3
109 Virginia Operators Exhibit 3
110 T. 1339-40; Central Pennsylvania Operators Exhibit 8
111 Central Pennsylvania Operators Exhibit 8

22 (3) Wage data were introduced for three companies located in Clay and Leslie Counties, Kentucky. [112] Each of these companies paid their production workers a minimum hourly wage of $1.25. A witness testified that these operators represented about half of the coal industry in Leslie County, by far the more important of the two counties, and that other operators in those counties also paid their workers a minimum rate of $1.25. [113]

(4) A representative of the Stearns Coal and Lumber Company located in McCreary County in Kentucky submitted wage data pertaining to soft coal operations in McCreary, Pulaski and a portion of Whitley Counties in Kentucky. [114] These data purported to indicate the distribution by average hourly rates of approximately 90 percent of the workers in the soft coal industry in that area. No indication was given, however, as to the number of coal companies which paid the various rates. The distribution disclosed that 15 percent of the workers surveyed earned less than $1.00 an hour and more than 25 percent of the workers earned exactly $1.00 an hour. The Stearns Coal and Lumber Company, largest coal producer within this area, paid its workers a minimum hourly wage of $1.531.

The evidence introduced by the UMWA pertaining to minimum wage rates and the number of employees who are covered by their collective bargaining agreements was challenged on the grounds that the evidence was for the year 1953, and, consequently, was obsolete for the purpose of determining the prevailing minimum wage in the Industry. [115]

The most recent agreement made with the coal operators by the UMWA is the National Bituminous Coal Agreement of 1950 as amended September 29, 1952. This agreement was stated by the union to be in effect during the year 1953 for those mines listed in UMW Exhibits 8-A through 8-H; furthermore, this agreement is in effect today, and has remained unchanged with respect to wage rates or any other provisions therein since September 29, 1952. [116]

112/ T. 579-80
113/ T. 570, 581-2
114/ T. 1166-7, 1172-3, 1832
115/ T. 71-4, 82-83, 172-3, 278-80
116/ T. 45, 243-4

Another question relating to the currency of the UMWA data involves the usefulness of 1953 statistics regarding employment and tonnage for coal companies listed in Exhibits 8-A through 8-H. A union representative explained that the primary source of those statistics was the state mine bureau reports. In this connection, he testified that such reports were available for all states included in UMW Exhibits 8-A through 8-H except Virginia, Montana, and Utah; also, with respect to Indiana the state report includes information only for deep mines, not for strip mining operations. The witness explained that the most recent state reports available to him in compiling UMW Exhibits 8-A through 8-H were for the year 1953, and that the 1954 reports had not yet been published. 117/ Keystone Coal Buyers Manual was also used in compiling the employment and tonnage statistics for certain mines operating under agreement with the UMWA. Again, however, the most recent edition of this publication available was the 1954 edition, which gives employment and tonnage data for 1953.

Tr 23 The collection and tabulation of statistics as comprehensive in scope as those detailing the employment and production of individual mines in the soft coal industry is a sizeable task requiring considerable time. It is unavoidable, therefore, that many months should elapse before the publication and dissemination of such data can be completed. In this regard, a witness explained that all of the various state mine bureau reports covering employment and production for the year 1954 would not be available until the close of 1955. 118/ This is also true for the U. S. Bureau of Mines' annual survey of bituminous coal and lignite mines for the year 1954 It is clear, therefore, that the most recent data available on the soft coal industry, which are of enough

117/ T. 69, 71-2, 117-9
118/ T. 531-4

detail to be sufficient for purposes of these proceedings, are for the year 1953.

There is information in the record which indicates that the final statistics for 1954 will disclose a sizeable decrease in soft coal production from that reported for 1953. The U. S. Bureau of Mines' final statistics for soft coal production in 1953 (exclusive of mines producing less than 1,000 tons) show a total of approximately 456,000,000 tons for the continental United States. [119] Virginia Operators Exhibit 11, the U. S. Bureau of Mines' weekly coal report for March 4, 1955, shows an estimated total production for the continental United States in 1954 of approximately 391 million tons, or a decrease of more than 14 percent from the previous year. It is not possible to ascertain from the U. S. Bureau of Mines' weekly report the extent to which this decrease in production was felt in mines under contract with UMWA, and there is no evidence to indicate that mines paying the union wage scale accounted for a significantly smaller proportion of the total soft coal production in 1954 than in the previous year.

It was also pointed out by some of those appearing in opposition to the petitioner's request that a number of the mines listed in UMW Exhibits 8-A through 8-H, were no longer operating under the union contract. [120] In illustration, the Stearns Coal and Lumber Company offered into evidence a copy of its collective bargaining agreement entered into on March 14, 1954 with the McCreary County Mine Union, which has no affiliation with the UMWA. [121] On the other hand, a representative of the UMWA testified that many mines not listed in their Exhibit 8 had become signatories to the union contract since 1953. [122] Thus, in the absence of detailed information pertaining to employment and tonnage of individual mines such as is available in the state mine bureau reports, the exact number of employees presently working under a

119/ Government Exhibit 7
120/ T. 759, 779, 835-6, 903, 985-6, 1371-2, 1972
121/ T. 1239
122/ T. 280, 1851

UMWA contract and the tonnage produced by such employees cannot be known. In any event, even if the total loss in coal production between 1953 and 1954 were attributable to mines paying wages not less than those called for in the UMWA agreements, and there is no evidence to this effect, the proportion of all soft coal production by mines producing a thousand tons or more in the continental United States, and under contract with the UMWA, would still be approximately 80 percent for the more recent year.

Tr 24 Outside of the four restricted geographical areas mentioned above, and one mine in Oklahoma which currently operates non-union but observes the UMWA scale, there is no information in the record indicating that any mines listed in UMW Exhibits 8-A through 8-H are not now operating under the union contract, nor is there any information indicating that the employees and tonnage produced under UMWA contracts in other areas are proportionately changed from those indicated by the Exhibits. Nor was there any challenge to any of the supplementary data offered by the proponents pertaining to mines in certain states not under contract with the UMWA, but paying their employees minimum wages not less than those called for in such contracts.

It was also asserted by the Virginia Operators and others that the wages provided in the UMWA contract are not paid to employees of all signatory companies. [123] Although it was alleged that violations of the union agreement were widespread, especially in Virginia and eastern Kentucky, no evidence of a reliable, probative, and substantial nature was introduced in support of this allegation. Most witnesses who testified on the point had no personal knowledge as to specific companies who were violating their contracts, but testified on the basis of rumor and hearsay. [124] One witness testified that he had personal knowledge that two signatory companies in eastern Kentucky were paying less than the rates called for by their contracts. Even this witness, however, refused to divulge the names of the companies concerning which he had such personal knowledge [125]

123/ T. 709-10, 747-9, 822-34, 858-9, 879-80, 1017-24, 1036-42, 1050-1, 1065-6, 1350-71, 1393-1400

124/ T. 662-5, 1038, 1119

125/ T. 825-8

It has been suggested that thedeficiency in the evidence supporting the charge of widespread contract violations might be overcome if I take official notice of the records of the Wage and Hour and Public Contracts Divisions with respect to inspections of mines pursuant to the Fair Labor Standards Act. This Act requires, generally speaking, that employees engaged in commerce or in the production of goods for commerce be paid not less than 75 cents an hour and time and one-half for hours in excess of 40 in any one week.

Violations of the wage and hour requirements of the Fair Labor Standards Act in the coal industry have not been extensive in the past. Routine investigations in this industry are therefore held to a minimum, most investigatory activity being directed toward those industries in which experience had demonstrated violations are most likely to be found. Furthermore, even in those isolated cases where coal mines have been investigated, the record would usually contain data on wages actually paid only in those cases where violations of the wage and hour requirements are found. The evidence of record with respect to wages and hours worked by coal miners demonstrates the unlikelihood of such violations in this industry. Wages in both union and non-union mines are substantially in excess of 75 cents an hour with overtime work being the exception rather than the rule.

The Divisions' inspection records would neither prove nor disprove the charge of widespread contract violations. Accordingly, no useful purpose would be served by taking notice of the contents of these records.

Tr 25 I am not convinced that violations of the UMWA agreement occur to the extent alleged. A representative of the union denied the truth of the rumors concerning widespread violations and testified that the union actively polices the agreement and corrects as rapidly as possible any violations which might occur. [126] One of the Virginia Operators' own witnesses testified that "all you hear is some rumors that the men are not making big wages"; that he did not know what grounds there were

126/ T. 1831

for the rumors; and that, in his opinion, union mines in his area of Virginia were compensating their employees according to the union agreement.[127]

On the basis of the record before me it is accordingly my conclusion that except in isolated and sporadic instances the wage rates called for by the UMWA agreement are being observed by the signatories thereto and that those violations that do occur are subject to corrective action by the union.

Such violations as may occur are not sufficient to invalidate the conclusion that a majority of the tonnage and employment in each district is associated with actual payment of wage rates not less than those called for by the UMWA agreement. In any event there would still appear to be a legal obligation to pay the contract rates and it would be no more appropriate to consider rates paid in violation of this contractual obligation than it would be to consider rates paid in violation of the statutory minimum under the Fair Labor Standards Act.

It was also charged that the wage scales as reflected in the UMWA agreements were inappropriate for purposes of establishing a prevailing minimum wage under the Public Contracts Act, because those agreements call for the payment of portal-to-portal time.[128] The minimum daily wages for inside employees as set forth in the current National Bituminous Coal Wage Agreement are based on an eight-hour working day. It is true that the eight hours include portal-to-portal time; however, the minimum hourly wage as requested by the petitioners is that wage which is paid for one hour's work. It is mandatory upon union operators to pay for portal-to-portal time as hours worked, but this practice in no way affects the minimum hourly wage as requested in the petition. Testimony was offered to the effect that it is not customary among non-union operators to pay for portal-to-portal time, or to include such time as hours worked. However, I do not consider the payment of portal-to-portal time as a matter within these proceedings. Whether a particular mine operator is required to pay his employees for portal-to-portal time is dependent entirely on those circumstances under which such time is compensable under the Portal-to-Portal Act of 1947.

127/ T. 1118-19

128/ T. 231, 643-5, 713-4

Tr 26 Prevailing Minimum Wages

The information contained in the record makes it possible to evaluate for each district the proportionate representation of employees and tonnage in those mines paying minimum wages not less than those called for in the UMWA contracts. As indicated above, the only comprehensive wage data were presented by the proponents of the petition. Data for portions of Districts 1, 2, 7 and 8 were presented by witnesses appearing in opposition to the petitioners' request.

With the exception of the wage data introduced by the opponents to the petitioners' request covering portions of Districts 1, 2, 7, and 8, no other such data were offered covering any district in addition to those offered by the proponents. The information contained in UMW Exhibits 8-A through 8-H leaves no doubt that the majority of employees working in Districts 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 13, 15, 16, 17, 19, 20, 21, 22, and 23 (excluding Alaska), was covered by UMWA contracts and the provisions for minimum rates prescribed therein. This conclusion is not affected even if all of the opponents' data with respect to Districts 1, 2, 7, and 8 are accepted at their full face value. In each of the districts except 15 and 22, the mines covered by UMWA agreements also accounted for the majority of tonnage produced by all mines within their respective districts reporting production of one thousand tons or more in 1953. 129/ When the information contained in UMW Exhibit 8-I and submitted for the record by Mr. George A. Lamb pertaining to other mines paying minimum rates not less than those called for in the UMWA agreements are added to the employment and tonnage figures for the mines listed in UMW Exhibits 8-A through 8-H, it is evident that the majority of employees in Districts 14 and 18 are also receiving minimum wages not less than those called for in the UMWA agreements, and that companies employing such workers also account for the majority of all tonnage reported in Districts 14, 15, 18, and 22. No production has

129/ Government Exhibit 7; UMW Exhibit 8

been reported from District 5 during 1953 or 1954.[130] and in view of the complete absence in the record of any data pertaining to that District, I am compelled to omit District 5 from my proposed minimum wage determination for the Industry.

UMW Exhibit 8-H as it pertains to the State of Iowa does not contain sufficient evidence to find that that minimum wage rate called for in the union contract covering District 12 is prevailing. More complete information for this District is contained in George A. Lamb Exhibit 5, which sets forth minimum rates for mines accounting for the majority of the estimated 1954 production for District 12. An analysis of these two exhibits discloses that of those mines surveyed, the majority of the employees and the tonnage were attributable to mines paying a minimum hourly wage of $1.40 or more. These two conditions are not satisfied at any higher wage.

For each of the other coal producing districts the record supports the petitioners' request as to the prevailing minimum rates in the Industry. The total tonnage and employment figures for mines paying minimum rates not less than those called for in the UMWA contracts
Tr 27 were measured by comparable figures for the Industry as reported by the U. S. Bureau of Mines for each district in 1953. For this purpose those mines listed in UMW Exhibits 8-A through 8-h for which no tonnage or employment figure was included, or which produced less than one thousand tons in 1953, were excluded.

The production of mines reporting less than one thousand tons of soft coal per year is insignificant. The most recent information on this matter is for the year 1944, a year of peak production, and a year in which roughly two thousand such mines were in operation. However, their total production during that year amounted to only 1/10 of 1 percent of the soft coal produced in the continental United States.[131]

130/ Government Exhibit 7; Virginia Operators Exhibit 11
131/ Government Exhibit 7

It appears clear, therefore, that an accurate evaluation of the proportionate tonnage and employment represented by mines under contract with the UMWA, or paying their employees minimum rates no less than those called for by the union contract, is obtainable by comparison with the statistics for the Industry as published by the United States Bureau of Mines. In all districts except 5 and 12 it is evident that mines accounting for the majority of tonnage and employment are paying their employees minimum wages no less than those called for in the UMWA contracts. The minimum hourly rates provided for in the UMWA contracts for day workers are as follows:

District 1.	$2.245	District 13.	$2.015
2.	2.245	14.	2.09
3.	2.245	15.	2.09
4.	2.245	16.	2.296
6.	2.245	17.	2.296
7.	2.245	18.	2.296
8.	2.245	19.	2.32
9.	2.09	20.	2.32
10.	2.245	21.	2.226
11.	2.28	22.	2.346
		23.	2.235

Tonnage Workers

The petitioners urged that tonnage workers be exempted from the minimum hourly wage determination requested for day workers. 132/ No one opposed the proposal. The petitioners also urged that adherence to the compensation provisions of UMWA contracts be regarded as compliance with the mininum wage provisions of the Walsh-Healey Public Contracts Act. 132/

The record indicates that piece rates have generally been designed to yield the majority of incentive workers in a given mine at least the minimum hourly rate guaranteed day workers and to yield the incentive workers as a group average hourly earnings in excess of the minimum;

132/ T. 236-7, 401-2

and that they do, in fact, accomplish these objectives. [133] Accordingly,
Tr 28 it appears desirable to recognize the compensation practices prevailing in the Industry with respect to incentive workers by providing that in the case of employees compensated in whole or in part on a piece-rate system, the minimum wage obligations under the Walsh-Healey Public Contracts Act will be fulfilled if a majority of the incentive workers engaged in work for the Government in a contracting establishment receives the prevailing minimum hourly rate applicable in the area during the period of time in which they perform such work, and if the average hourly earnings of these incentive workers as a group exceed this minimum.

However, it is also apparent from the record that while the compensation of a majority of the incenitve workers generally equals or exceeds the applicable minimum hourly rates, there are periods of time during which difficult operating conditions such as thin seams or high proportions of slate render this untrue for a particular mine. [134] Consequently, it appears desirable to regard a mine as in compliance with the minimum wage provisions of the Act, despite failure to meet the standards during the particular period in which Government contract work is performed, if it can demonstrate that a majority of its incentive workers have or would have earned at least the minimum and that the average hourly earnings of its incentive workers as a group have or would have exceeded that minimum under normal mining conditions with the compensation arrangements prevailing during the period in which the mine was producing for the Government.

133/ T. 90-1, 235-6, 261-2, 413-6, 500-2, 613, 687, 763, 766, 1103-8, 1113-5, 1129, 1132-3, 1191-1201, 1554-7, 1597, 1626-7, 1728, 1733-43.

134/ T. 85, 1103-8, 1112-5, 1129, 1132-3, 1198-1200, 1557.

Tr 31 Proposed Decision

Notice is hereby given that in accordance with all of the considerations expressed herein, I propose to issue a decision in this matter as set forth below. Any interested party may submit, within 30 days from publication of this proposed decision in the Federal Register, a statement in writing (original and four copies) setting forth any exceptions he may have to this decision, together with supporting reasons for such exceptions.

Title 41, Code of Federal Regulations, Part 202 is amended by the addition of the following new subsection:

Section 202.51 Bituminous Coal Industry.

* * * * * *

(b) Minimum Wage: The minimum wage for employees (other than auxiliary workers) engaged in the performance of contracts with agencies of the United States subject to the provisions of the Act for production or furnishing of bituminous coal (including lignite) shall be the amount indicated for each area as follows:

* * * * * *

DISTRICT 7: - SOUTHERN NUMBERED 1; $2.245

The following counties in West Virginia: Greenbrier, Mercer, Monroe, Pocahontas, Summers.

Fayette County, east of Gauley River and including the Gauley River branch of the Chesapeake and Ohio Railroad and mines served by the Virginian Railway.

McDowell County, that portion served by the Dry Fork branch of the Norfolk and Western Railroad and east thereof.

Raleigh County, excluding all mines on the Coal River branch of the Chesapeake and Ohio Railroad.

Wyoming County, that portion served by the Gilbert branch of the Virginian Railway lying east of the mouth of Skin Fork of Guyandot River and that portion served by the main line and the Glen Rogers branch of the Virginian Railway.

The following counties in Virginia: Montgomery, Pulaski, Wythe, Giles, Craig.

Tr 33 Tazewell County, that portion served by the Dry Fork branch to Cedar Bluff and from Bluestone Junction to Boissevain branch of the Norfolk and Western Railroad and Richlands-Jewell Ridge branch of the Norfolk and Western Railroad.

Buchanan County, that portion served by the Richlands-Jewell Ridge branch of the Norfolk and Western Railroad and that portion of said county on the headwaters of Dismal Creek, east of Lynn Camp Creek (a tributary of Dismal Creek.)

DISTRICT 8. - SOUTHERN NUMBERED 2: $2.245

The following counties in West Virginia: Boone, Clay, Kanawha, Lincoln, Logan, Mason, Mingo, Putnam, Wayne, Cabell.

Fayette County, west of, but not including mines of the Gauley River branch of the Chesapeake and Ohio Railroad.

McDowell County, that portion not served by and lying west of the Dry Fork branch of the Norfolk and Western Railroad.

Raleigh County, all mines on the Coal River branch of the Chesapeake and Ohio Railroad and north thereof.

Nicholas County, that part south of and not served by the Baltimore and Ohio Railroad.

Wyoming County, that portion served by Gilbert branch of the Virginian Railway lying west of the mouth of Skin Fork of Guyandot River.

The following counties in Virginia: Dickinson, Lee, Russell, Scott, Wise.

All of Buchanan County, except that portion on the headwaters of Dismal Creek, east of Lynn Camp Creek (tributary of Dismal Creek) and that portion served by the Richlands-Jewell Ridge branch of the Norfolk and Western Railroad

Tazewell County, except portions served by the Dry Fork branch of Norfolk and Western Railroad and branch from Bluestone Junction to Boissevain of Norfolk and Western Railroad and Richlands-Jewell Ridge branch of the Norfolk and Western Railroad

The following counties in Kentucky: Bell, Boyd, Breathitt, Carter, Clay, Clinton, Elliott, Floyd, Greenup, Harlan, Jackson, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, McCreary, Magoffin, Martin, Menifee, Morgan, Owsley, Perry, Pike, Pulaski, Rockcastle, Wayne, Whitley, Wolfe.

The following counties in Tennessee: Anderson, Campbell, Claiborne, Cumberland, Fentress, Morgan, Overton, Pickett, Putnam, Roane, Scott.

The following counties in North Carolina: Lee, Chatham, Moore.

* * * * * *

Signed at Washington, D.C.
this 3rd day of August, 1955

/s/ James P. Mitchell
Secretary of Labor

Published in August 6, 1955 Federal Register

[Filed October 26, 1955, Dept. of Labor]

Tr 1

UNITED STATES DEPARTMENT OF LABOR

WASHINGTON, D.C.

Division of Public Contracts

(29 CFR, PART 202)

BITUMINOUS COAL INDUSTRY

Determination of Prevailing Minimum Wages

On August 6, 1955, notice was published in the Federal Register of a proposed decision of the Secretary of Labor in regard to the determination of the prevailing minimum wages pursuant to the Walsh-Healey Public Contracts Act (49 Stat. 2036; 41 U.S.C. Sec. 35, et seq.), for the Bituminous Coal Industry (20 F.R. 5690). The notice allowed a period of 30 days in which interested parties might submit exceptions to the proposed decision.[1/]

Exceptions and objections to the proposed decision have been received from the Central Pennsylvania Open Pit Mining Association, from some 300 operators in the State of Virginia (hereinafter referred to as the Virginia Operators), from the Stearns Coal and Lumber Company on its own behalf and on behalf of 30 other operators in McCreary, Pulaski, and Whitley Counties, Kentucky, from the Laddie Coal and Mining Company, Robbins, Tennessee, from the Hawthorne Coal and Coke Company, Norton, Virginia, and from operators in Clay and Leslie Counties, Kentucky.

* * * * * *

1/ Two requests were received for an extension of time within which to file exceptions. However, the need for additional time, in view of the variety of issues presented, was anticipated in advance. The proposal, accordingly, granted 30 days for filing instead of the 15-day period provided in the Rules of Practice. In view of this fact and in view of the many other parties having an interest in this matter, further delay in reaching a final decision was not deemed advisable.

Tr 2 Several exceptions have been filed with respect to the basis of the determination. Many of these exceptions are directed at the failure of the notice of hearing to make reference to all of the bases for wage determinations set forth in Section 1(b) of the Act.

Section 1(b) of the Act provides for determination by the Secretary of Labor of "the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished." The Act does not require that the determination of minimum wages be on the basis of all or a combination of the various standards. The Act confers discretion on the Secretary of Labor in the choice of the method by which he shall proceed to determine the prevailing minima. No request was received prior to the hearing that the scope of the inquiry go beyond the question of the wages prevailing in the Bituminous Coal Industry. It is apparent from the record that there are ample data as to wages paid in the entire Bituminous Coal Industry and that it has long been recognized as a unique industry with a distinctive wage structure. Accordingly I find that there is no need to go outside the Industry or to consider any of the alternative standards.

Several other objections have been received as to the content and timing of the notice of hearing. These objections are substantially the same as those previously filed and considered in the proposed decision. Many of them are based on the theory that the notice of hearing limited the issue in this proceeding to either adoption or rejection of the proposal of petitioners as set forth in the notice of hearing. This theory is not supported by the language of the notice. The notice did not call solely for data, views, and argument as to the propriety of petitioners' proposals. On the contrary, the notice, in general terms, called for data and evidence which could form the basis of a rule to be proposed subsequent to the hearing. It contemplated a hearing at which various proposals and evidence in support thereof would be submitted.

Tr 3 The notice has also been challenged on the ground that it failed to set forth all of the issues that arose at the hearing. The necessity for some generality of notice in rule-making proceedings has been considered in the proposal. For the reasons stated therein, I consider this objection to be without merit.

I have reviewed my earlier findings as to the content and timing of the notice of hearing and I have considered all objections here raised which are based upon alleged imperfections in the content and timing of the notice. In the light of this review, it is my conclusion that the notice adequately described the subjects and issues involved, and sufficiently in advance of the hearing, to permit effective public participation. All objections to the content and timing of the notice of hearing, to previous findings concerning the subject, and to specific findings on the grounds of alleged inconsistency with the notice of hearing are therefore overruled.

An objection has been filed to the proposed definition of the Industry. It is asserted that captive mines should be specifically excluded from the definition and that wages paid therein should not be considered in determining the prevailing minimum wages in the Industry. In support of this contention, it is argued that coal produced in captive mines is not sold to the Government, but is consumed exclusively by the owner for his own purposes. This argument assumes that it is the function of a wage determination to reflect the minimum wage which prevails only among Government contractors in the industry. Section 1(b) of the Act, on the other hand, contemplates that the Secretary of Labor determine the minimum wages which prevail in the entire industry. It was the very purpose of the Act that the award of Government contracts should not operate to depress minimum wage standards prevailing in the industry generally. The argument that the determination should ignore the wages paid in a substantial segment of the Bituminous Coal Industry merely because that segment does not currently contract with the Government runs counter to both the terms and the basic purposes of the Act.

* * * * * *

Tr 4 The proponents of various geographic units other than production districts as wage determination areas have renewed their arguments in favor of their respective areas. The areas supported in these contentions are the State of Virginia; Clay and Leslie Counties, Kentucky; 21 contiguous counties in Central Pennsylvania; and McCreary, Pulaski and a part of Whitley Counties, Kentucky. All of these areas and the arguments advanced in support thereof were discussed in detail in the proposal.

In taking exception to the choice of production districts as wage determination areas, it is asserted that there exist within individual districts variations in methods of mining, characteristics of the coal, freight rates, and mining conditions generally. These variations, however, are characteristic of the Bituminous Coal Industry and exist to a much greater degree among the different production districts. The existence of these varying economic characteristics and the fact that historically they have been considered in the development of the differentials between the minimum wages prevailing in competing districts are persuasive reasons for using a district approach in this determination rather than alternative areas suggested at the hearing. The fact that differences may exist between mines within a single production district does not affect the conclusion that, generally speaking, common natural economic characteristics which affect the ability of mines to compete prevail within individual districts. That these characteristics

Tr 5 do prevail on a district basis is demonstrated not only by evidence of record as to the background and origin of the production districts, but by the existence of well established uniform patterns of prevailing minimum wages according to districts.

The use of production districts is also challenged on the ground that the wage data introduced by the petitioners at the hearing were not collated or assembled on a production district basis and that there is nothing in the record upon which a production district evaluation can be made.

Considerable data introduced by petitioners are on a district basis. Even where this is not the case, mines having UMWA contracts or paying minimum wages at least equal to those specified in such contracts are identified by name and address and in most cases, the 1953 tonnage and employment are given for each mine. The record also contains the precise boundaries of each production district and the total production and employment on a production district basis for the year 1953. With these basic data and the aid of such standard works as Rand McNally's Commercial Atlas and a Postal Guide, it is possible to ascertain a minimum percentage for 1953 of both total production and employment for each production district accounted for by UMWA signatories and those non-signatories paying not less than the minimum called for in the UMWA contracts.

In view of the basic data in the record, the charge that there is nothing in the record upon which a district evaluation can be made is unfounded. However, in view of the objections raised, the wage data of record have again been checked on a district basis. This recheck confirms the conclusion that a majority of both tonnage and employment was accounted for by mines paying minimum rates at least equal to those called for in the UMWA contracts in all producing districts except district 12.[3/]

3/ There are a few instances where doubt exists as to whether a particular mine is located in one or the other of two adjoining districts. Careful consideration has been given to this problem, however, and in no instance could the location of such mines in one district or the other affect the conclusion that in all producing districts except district 12 a majority of both tonnage and employment was accounted for by the mines paying minimum rates at least equal to those called for in the UMWA agreements. This conclusion is not affected even if all mines operating under the union agreement in 1953 which are shown by the record to have been out of operation at the time of the hearing, or though operating, were no longer signatories to the union agreement, are excluded in arriving at union totals.

It has also been asserted that a district evaluation cannot be made since the breakdown and evaluation has not been subject to cross-examination. However, the evaluation is made from evidence which was subject to cross-examination when it was introduced. Moreover, the parties have had an opportunity to object to the proposed evaluation and have failed to point to, or tender, any evidence indicating that it is not accurate.

Tr 6 Exception has been taken to my statement that I do not consider the question of portal-to-portal pay as a matter within these proceedings. It is argued that both the daily wage of shift workers and the tonnage formula for incentive workers are designed to reflect portal-to-portal pay and that if a minimum based on these wage scales is placed in effect, it will have the effect of imposing upon non-union operators the payment of portal-to-portal pay in violation of the Portal Act.

It is true that under the UMWA agreements the pay for both classes of workers includes a certain amount for travel time within the mine. The fact, however, that the daily earnings include compensation for travel time does not increase the hourly rate nor make it any less "prevailing" than does the fact that the rate reflects other factors considered in the process of wage bargaining. The minimum hourly rates set forth in the proposal are those rates which prevail for one hour's work. Whether a particular operator is required to pay this rate portal-to-portal or only for time spent at the mine face is dependent entirely on those circumstances governing the compensability of travel time under the Portal-to-Portal Act of 1947. In view of this fact, all exceptions to the use of WMWA data on the ground that its use violates the Portal Act are overruled.

* * * * * *

Several other objections have been filed which are based on issues fully covered in the proposal. These include consideration of the "open market" exemption contained in the Act, conclusions as to the conflict of the proposal with existing employment contracts, the nature and adequacy of the prevailing wage data, the propriety of basing the

determination on 1953 production and employment data, questions as to the minimum rate prevailing in various areas, and the question raised on the record as to whether union mines were in fact living up to their contractual obligations. I have again reviewed each and every issue

Tr 7 previously raised and for the reasons stated in the proposal, overrule these objections. [4]

* * * * * *

Tr 8 Upon reviewing the entire record in the light of all objections and exceptions filed, it is my conclusion that the proposed decision, amended by deleting the phrase "for market" from the definition of the industry, should be adopted Accordingly, pursuant to the authority vested in me by the Walsh-Healey Public Contracts Act, Title 41, Code of Federal Regulations, Part 202, is hereby amended by addition of the following new subsection:

Section 202.51 Bituminous Coal Industry.

(a) Definition: The Bituminous Coal Industry is defined as that industry which produces or furnishes all coal (including lignite) except Pennsylvania anthractie. "Produces or furnishes" includes mining or other extraction, and the loading, screening, sizing, washing,

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4/ With respect to the necessity for using 1953 production data, the Virginia Operators have requested that I take official notice of the 1954 report of the Virginia State Department of Labor and Industry. It is asserted that this demonstrates the availability of more current data with respect to this State. The report, however, does not contain data as to tonnage and employment of individual mines for the year 1954, nor is it possible to determine from the report the proportion of the State's total tonnage coming from districts 7 and 8.

The Virginia operators have asserted that as a reuult of decreased production in union mines in 1954, the union minimum no longer prevails in their area. The record shows, however, that even if the total estimated decrease in production and employment in districts 7 and 8, which include the Virginia fields, were attributed to union mines, the union minimum would still prevail in each district. This is also true for districts 1 and 2 concerning which the same assertion was made by the Pennsylvania Open Pit Mining Association

oiling and other preparation of bituminous coal, and activities incidental to these operations. The term "preparation of bituminous coal" does not include any activities performed at Great Lakes or tidewater docks.

Tr 9 (b) Minimum Wage: The minimum wage for employees (other than auxiliary workers) engaged in the performance of contracts with agencies of the United States subject to the provisions of the Act for production or furnishing of bituminous coal (including lignite) shall be the amount indicated for each area as follows:

DISTRICT 1. - EASTERN PENNSYLVANIA: $2.245

The following counties in Pennsylvania: Bedford, Blair, Bradford, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Elk, Forest, Fulton, Huntingdon, Jefferson, Lycoming McKean, Mifflin, Potter, Somerset, Tioga.

Armstrong County, including mines served by the Pittsburgh and Shawmut Railroad on the west bank of the Allegheny River, and north of the Conemaugh division of the Pennsylvania Railroad.

Fayette County, all mines on and east of the line of Indian Creek Valley branch of the Baltimore and Ohio Railroad.

Indiana County, north of but excluding the Saltsburg branch of the Pennsylvania Railroad between Edri and Blairsville, both exclusive.

Westmoreland County, including all mines served by the Pennsylvania Railroad, Torrance, and east.

All coal-producing counties in the State of Maryland.

The following counties in West Virginia: Grant, Mineral, and Tucker.

DISTRICT 2. - WESTERN PENNSYLVANIA: $2.245

The following counties in Pennsylvania: Allegheny, Beaver, Butler, Greene, Lawrence, Mercer, Venango, Washington.

Armstrong County, west of the Allegheny River and exclusive of mines served by the Pittsburgh and Shawmut Railroad.

Indiana County, including all mines served on the Saltsburg branch of the Pennsylvania Railroad north of Conemaugh River.

Fayette County, except all mines on and east of the line of Indian Creek Valley branch of the Baltimore and Ohio Railroad.

Westmoreland County, including all mines except those served by the Pennsylvania Railroad from Torrance, east.

DISTRICT 3. - NORTHERN WEST VIRGINIA: $2.245

The following counties in West Virginia: Barbour, Braxton, Calhoun, Doddridge, Gilmer, Harrison, Jackson, Lewis, Marion, Monongalia, Pleasants, Preston, Randolph, Ritchie, Roane, Taylor, Tyler, Upshur, Webster, Wetzel, Wirt, Wood.

Tr 10 That part of Nicholas County including mines served by the Baltimore and Ohio Railroad and north.

DISTRICT 4. - OHIO; $2.245

All coal-producing counties in Ohio.

DISTRICT 5. - MICHIGAN: (no determination)

DISTRICT 6. - PANHANDLE: $2.245

The following counties in West Virginia: Brooke, Hancock, Marshall, and Ohio.

DISTRICT 7. - SOUTHERN NUMBERED 1: $2.245

The following counties in West Virginia: Greenbrier, Mercer, Monroe, Pocahontas, Summers.

Fayette County, east of Gauley River and including the Gauley River branch of the Chesapeake and Ohio Railroad and mines served by the Virginian Railway.

McDowell County, that portion served by the Dry Fork branch of the Norfolk and Western Railroad and east thereof.

Raleigh County, excluding all mines on the Coal River branch of the Chesapeake and Ohio Railroad

Wyoming County, that portion served by the Gilbert branch of the Virginian Railway lying east of the mouth of Skin Fork of Guyandot River and that portion served by the main line and the Glen Rogers branch of the Virginian Railway.

The following counties in Virginia: Montgomery, Pulaski, Wythe, Giles, Craig

Tazewell County, that portion served by the Dry Fork branch to Cedar Bluff and from Bluestone Junction to Boissevain branch of the Norfolk and Western Railroad and Richlands-Jewell Ridge branch of the Norfolk and Western Railroad.

Buchanan County, that portion served by the Richlands-Jewell Ridge branch of the Norfolk and Western Railroad and that portion of said county on the headwaters of Dismal Creek, east of Lynn Camp Creek (a tributary of Dismal Creek.)

DISTRICT 8. - SOUTHERN NUMBERED 2: $2.245

The following counties in West Virginia: Boone, Clay, Kanawha, Lincoln, Logan, Mason, Mingo, Putnam, Wayne, Cabell.

Tr 11 Fayette County, west of, but not including mines of the Gauley River branch of the Chesapeake and Ohio Railroad.

McDowell County, that portion not served by and lying west of the Dry Fork branch of the Norfolk and Western Railroad.

Raleigh County, all mines on the Coal River branch of the Chesapeake and Ohio Railroad and north thereof.

Nicholas County, that part south of and not served by the Baltimore and Ohio Railroad.

Wyoming County, that portion served by Gilbert branch of the Virginian Railway lying west of the mouth of Skin Fork of Guyandot River.

The following counties in Virginia; Dickinson, Lee, Russell, Scott, Wise.

All of Buchanan County, except that portion on the headwaters of Dismal Creek, east of Lynn Camp Creek (tributary of Dismal Creek) and that portion served by the Richlands-Jewell Ridge branch of the Norfolk and Western Railroad.

Tazewell County, except portions served by the Dry Fork branch of Norfolk and Western Railroad and Branch from Bluestone Junction to Boissevain of Norfolk and Western Railroad and Richlands-Jewell Ridge branch of the Norfolk and Western Railroad.

The following counties in Kentucky: Bell, Boyd, Breathitt, Carter, Clay, Clinton, Elliott, Floyd, Greenup, Harlan, Jackson, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, McCreary, Magoffin, Martin, Menifee, Morgan, Owsley, Perry, Pike, Pulaski, Rockcastle, Wayne, Whitley, Wolfe.

The following counties in Tennessee: Anderson, Campbell, Claiborne, Cumberland, Fentress, Morgan, Overton, Pickett, Putnam, Roane, Scott.

The following counties in North Carolina: Lee, Chatham, Moore.

DISTRICT 9. - WEST KENTUCKY: $2.09

The following counties in Kentucky; Butler, Christian, Crittenden, Daviess, Hancock, Henderson, Hopkins, Logan, McLean, Muhlenberg, Ohio, Simpson, Todd, Union, Warren, Webster.

DISTRICT 10. - ILLINOIS: $2.245

All coal-producing counties in Illinois.

DISTRICT 11. - INDIANA: $2.28

All coal-producing counties in Indiana.

DISTRICT 12. - IOWA: $1.40

Tr 12 All coal-producing counties in Iowa.

DISTRICT 13. - SOUTHEASTERN: $2.015

All coal-producing counties in Alabama.

The following counties in Georgia: Dade, Walker.

The following counties in Tennessee: Marion, Grundy, Hamilton, Bledsoe, Sequatchie, White, Van Buren, Warren, McMinn, Rhea.

DISTRICT 14 - ARKANSAS-OKLAHOMA: $2.09

The following counties in Arkansas: All counties in the State.

The following counties in Oklahoma: Haskell, Le Flore, Sequoyah.

DISTRICT 15. - SOUTHWESTERN. $2.09

All coal-producing counties in Kansas. All coal-producing counties in Texas. All coal-producing counties in Missouri.

The following counties in Oklahoma: Coal, Craig, Latimer, McIntosh, Muskogee, Okmulgee, Pittsburg, Rogers, Tulsa, Wagoner.

DISTRICT 16. - NORTHERN COLORADO: $2.296

The following counties in Colorado: Adams, Arapahoe, Boulder, Douglas, Elbert, El Paso, Jackson, Jefferson, Larimer, Weld.

DISTRICT 17. - Southern Colorado: $2.296

The following counties in Colorado: All counties not included in northern Colorado district.

The following counties in New Mexico: All coal-producing counties in the State of New Mexico, except those included in the New Mexico district.

DISTRICT 18. - NEW MEXICO: $2.296

The following counties in New Mexico: Grant, Lincoln, McKinley, Rio Arriba, Sandoval, San Juan, San Miguel, Santa Fe, Socorro.

The following counties in Arizona: Pinal, Navajo, Graham, Apaches, Coconino.

All coal-producing counties in California.

DISTRICT 19. - WYOMING: $2.32

Tr 13 All coal-producing counties in Wyoming.

The following counties in Idaho: Fremont, Jefferson, Madison, Teton, Bonneville, Bingham, Bannock, Power, Caribou, Oneida, Franklin, Bear Lake.

DISTRICT 20. - UTAH: $2.32

All coal-producing counties in Utah.

DISTRICT 21. - NORTH DAKOTA-SOUTH DAKOTA: $2.226

All coal-producing counties in North Dakota. All coal-producing counties in South Dakota.

DISTRICT 22. - MONTANA: $2.346

All coal-producing counties in Montana.

DISTRICT 23. - WASHINGTON: $2.235

All coal-producing counties in Washington. All coal-producing counties in Oregon.

(c) Tonnage Workers. In the case of employees compensated in whole or in part under a piece rate system, the minimum wage obligations under the Walsh-Healey Public Contracts Act will be fulfilled if

a majority of the incentive workers engaged in work for the Government in a contracting establishment receives the applicable prevailing minimum hourly rate as set forth in (b) above during the period of time in which they perform such work, and if the average hourly earnings of the group of incentive workers engaged in work for the Government exceed this minimum during this period. Notwithstanding a mine's failure to meet the foregoing requirement during the particular period in which Government contract work is performed, it will nevertheless be regarded as in compliance with the minimum wage provisions of the Act if it can demonstrate that a majority of its incentive workers have or would have earned at least the minimum wage and that the average hourly earnings of such workers as a group have or would have exceeded that minimum under normal mining conditions under the compensation arrangements prevailing during the period in which the mine was producing for the Government.

(d) Auxiliary Workers. The term "auxiliary workers" as applied to employees in the Bituminous Coal Industry shall include employees who are employed in the following occupations or combinations of occupations:

Tr 14 ENGINEERING

1. Rodman
2. Chainman
3. Assistant Transitman
4. Transitman or Transit Worker
5. Corpman
6. Surveyor
7. Junion Draftsman
8. Draftsman
9. Engineer, Mining and Civil
10. Surveyor Helper

LABORATORY

1. Laboratory Assistant
2. Laboratory Technician

3. Sampler
4. Chemist Helper or Assistant Chemist
5. Chemist
6. Laboratory Sample Grinder

SHIPPING

1. Billing Clerk
2. Shipping Clerk
3. Shipper
4. Weighmaster or Retail Weighmaster
5. Weighman, Scaleman, or Weighboss
6. Mine Clerk
7. Payroll Clerk

SUPPLY

1. Supply Clerk, Warehouse Clerk, or Store Clerk
2. Supplyman, Warehouseman, Storeman, or Storekeeper
3. Supply Purchasing Agent

OTHER

1. Prospecting Driller and Assistant Driller
2. Other Prospecting Crew Members
3. Coal Inspector
4. Coal Preparation Technician
5. Dispatcher
6. Electrician or Electrical Engineer
7. Shift Maintenance Foreman
8. Machinist Foreman
9. Lampman
10. Utility Truck Driver
11. Machinist
12. Timekeeper and Assistant Timekeeper
13. Powerhouse, Sub-Station, and Pump Attendant
14. Hoisting Engineer

Tr 15 (e) Subminimum Wages Authorized. Handicapped workers may be employed at wages below the applicable minimum wages specified herein upon the same terms and conditions as are prescribed for the employment of handicapped workers by the Regulations of the Administrator of the Wage and Hour Division of the Department of Labor (29 CFR Parts 524 and 525), under section 14 of the Fair Labor Standards Act, as amended.

The Administrator of the Public Contracts Division is authorized to issue certificates under the Public Contracts Act for the employment of handicapped workers not subject to the Fair Labor Standards Act or subject to different minimum rates of pay under the two Acts, at appropriate rates of compensation and in accordance with the standards and procedures prescribed by the applicable regulations issued under the Fair Labor Standards Act.

(f) Effect on Other Obligations. Nothing in this determination shall affect any obligation for the payment of minimum wages that an employer may have under any law or agreement more favorable to employees than the requirements of this determination.

(g) Effective Date. This determination shall be effective and the minimum wages hereby established shall apply to all contracts subject to the Public Contracts Act, bids for which are solicited or negotiations otherwise commenced on or after

Signed at Washington, D.C.
this 21st day of October, 1955.

/s/ James P. Mitchell
Secretary of Labor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RUTH ELKHORN COALS, INC., ET AL. Plaintiffs, vs. JAMES P. MITCHELL, UNITED STATES SECRETARY OF LABOR, Defendant.	)	Civil Action No. 5052-55

COMPLAINT

FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

The Plaintiffs, complaining of the Defendant, respectfully allege and represent to this Court as follows:

1. The Plaintiffs are doing business under and in accordance with the laws of various states of the United States and their principal places of business are as set forth in the caption above.

2. Each and all of the Plaintiffs are engaged in producing and furnishing bituminous coal in the industry to which the wage determination herein complained of purports to be applicable.

3. The Defendant, James P. Mitchell, as the Plaintiffs are informed and believe, is the duly appointed, qualified, confirmed and acting Secretary of Labor and head of the Department of Labor of the United States.

4. On January 1, 1955, The Acting Secretary of Labor, in behalf of the Defendant, purporting to act under the Walsh-Healey Public Contracts Act (41 U.S.C.A. 35) as amended (Sec. 301, Defense Production Act Amendments of 1952, 66 Stat. 308) issued a "Notice of Public Hearing on the Determination of the Prevailing Minimum Wages for the Bituminous Coal Industry." Said Notice recited that the United Mine Workers of America (hereinafter referred to as the UMWA),

the Pittsburgh Consolidated Coal Company, and the Pocahontas Fuel Company had submitted a petition dated December 15, 1954, for the determination of prevailing minimum wages for persons employed in the Bituminous Coal Industry; and that certain minimum wages "computed on a portal-to-portal basis" were being "predominantly paid" in ten localities which were designated Areas A to J inclusive. The wage rates petitioned for were the rates provided for in the National Bituminous Coal Agreement of 1950, as amended, between the UMWA and certain coal producers. The areas petitioned for were the geographical locations in which said wage rates respectively applied. Pursuant to said Notice a public hearing was held on February 1, 1955, and concluded on February 26, 1955. While said hearing was in progress, the Defendant, as a member of the Advisory Committee on Energy Supplies and Resources Policy, recommended, inter alia, that "The Secretary of Labor should pursue his present policy of making determinations of wage standards applicable in the coal producing areas and should establish these standards at the earliest possible date". On April 4, 1955, the Plaintiffs filed with the Defendant a Memorandum in Opposition to any proposed wage determination. On April 22, 1955, the Plaintiffs filed with the Defendant a petition signed by 305 Bituminous Coal Operators in Virginia requesting a hearing for the purpose of establishing that the Virginia locality contended for would be the proper locality if a prevailing wage determination should be made and that the prevailing minimum wage for that locality is $1.25 per hour instead of $2.245 per hour as proposed in the Notice of Hearing. On May 9, 1955, the Defendant denied the request for hearing stating that the Plaintiffs "will have an opportunity to submit (their) comments with respect to any proposed order which may be issued as a result of the recent hearing". On August 6, 1955, the Defendant issued a "Notice of Proposed Determination of Prevailing Minimum Wages for Bituminous Coal Industry". On September 6, 1955, the Plaintiffs filed with the Defendant sixty exceptions and objections to the Proposed Determination. On October 21, 1955, the Defendant issued a Determination

of Prevailing Minimum Wages for the Bituminous Coal Industry incorporating in part therein the findings and conclusions contained in his Proposed Determination and establishing 23 "Districts" as "localities" and determining minimum wages for each "District", the wage being the same for eight "Districts" embracing seven states and parts of two others.

5. This action is brought pursuant to Section 10 of the Walsh-Healey Public Contracts Act as amended (41 U.S.C.A. Sec. 43a) which provides that review of any wage determination under the Act may be had, within ninety days after such wage determination is made, "by any person adversely affected or aggrieved thereby, who shall be deemed to include any manufacturer of, or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable", such review to be had in the manner provided in Section 10 of the Administrative Procedure Act (5 U.S.C.A. Sec. 1009). Some of these Plaintiffs have in the past bid upon and obtained contracts with the United States Government; some of these Plaintiffs have produced and furnished bituminous coal to others who have bid upon and obtained such contracts; and all of these Plaintiffs plan and expect in the immediate future to prpduce and furnish coal

TR 7 to be applied to such contracts or to bid for and obtain contracts which the Plaintiffs expect to be offered by agencies of the United States Government, and which would be subject to the Prevailing Minimum Wage Determination for the Bituminous Coal Industry unless said Determination is set aside; and all of these Plaintiffs desire to be eligible to produce and furnish coal for such contracts and plan to bid for such contracts or sell their coal to bidders for such contracts when the proper occasion presents itself. If the Determination is not set aside, all of these Plaintiffs will be seriously and irreparably injured because they are subject to the Walsh-Healey Public Contracts Act and the Wage Determination and the prevailing minimum wage in the

Virginia-Eastern Kentucky coal fields is less than the minimum prescribed in said Determination. The Government, therefore, will not award such Plaintiffs or the persons through whom they might sell, the profitable contracts which they expect to be offered unless they raise their wages. If they should raise their wages they will not be able to compete for Government business without sustaining a loss, and they will not be able to sell their coal to non-governmental purchasers without increasing their price which will result in a loss of their non-governmental business to the competition of cheaper fuels. By reason of the foregoing and other matters, the Plaintiffs are aggrieved and their interests are adversely affected by said Determination.

Jurisdiction to grant the declaratory judgment herein requested is founded upon the Declaratory Judgment Act (28 U.S.C.A. Sec. 2201). The amount in controversy in this action exceeds the sum of $3,000, exclusive of interests and costs.

Tr 8 6. The aforesaid Determination is unlawful in that it purports to establish as the prevailing minimum wages for the Bituminous Coal Industry the wages provided for in the National Bituminous Coal Agreement of 1950 as amended September 29, 1952, despite the fact that since the record in this proceeding was closed the UMWA and the coal producers have negotiated and placed in effect a new National Bituminous Coal Agreement providing for higher wage rates thus rendering the old wage rates relied upon by the Defendant herein obsolete and non-existent.

7. The aforesaid Determination is unlawful in that it is based upon the following interpretation of Section 1(b) of the Walsh-Healey Act which seeks to apply standards not provided for by the Act and which are contrary to the ruling of this Court in the cases of Covington Mills v. Mitchell; Alabama Mills v. Mitchell:

"In the context of the Act it seems proper to conclude that the phrase 'currently operating in the locality' was intended to qualify only groups of industries and does not

limit 'similar work' or 'particular or similar industries'. Thus, where a determination, as in the instant case, is made on the basis of the particular industry, there is no requirement in the Act itself that the determination be made on other than an industry-wide basis. Where, however, competitive and other economic factors are such that an industry-wide determination is not required or appropriate to carry out the purposes of the Act, wage determinations have been made which recognize area breakdowns of particular industries".

8. The aforesaid Determination is unlawful and the Defendant has acted contrary to the purposes of the Act and contrary to the ruling of this Court in that while he purports to determine the prevailing minimum wage by geographically small "localities", he establishes the same wage, identical with the UMWA wage, for eight alleged "Districts" embracing seven states and parts of two others, thereby establishing in reality a "locality" having dimensions beyond those that may be properly determined.

Tr 9 9. The aforesaid Determination is unlawful and in excess of the statutory jurisdiction and authority of the Defendant in that the Defendant has refused to consider, and has ruled that there cannot be raised in this proceeding, the Plaintiffs' contention that, under Section 9 of the Walsh-Healey Public Contracts Act, bituminous coal is a commodity that "may usually be bought in the open market" and is exempt therefore from the coverage of the Act.

10. The aforesaid Determination is unlawful and in excess of the Defendant's statutory authority and jurisdiction in that the Defendant has included "portal-to-portal" pay in the hourly rates found by the Defendant to be the prevailing minimum wages for the Bituminous Coal Industry thereby requiring coal producers, who do not by custom, practice or contract, make "portal-to-portal" payment to pay a wage which includes "portal-to-portal" payment in violation of the Portal-to-Portal Act (29 U.S.C.A. Sec. 254).

11. The aforesaid Determination is unlawful in that the Defendant has not conducted the proceeding relating thereto in accordance with the provisions of the Administrative Procedure Act (5 U.S.C.A. Sec. 1001 et seq) as required by the Walsh-Healey Public Contracts Act as amended (41 U.S.C.A. Sec. 43a), as hereinafter set forth in paragraphs 12 to 26.

12. The aforesaid Determination is unlawful and the Defendant has acted arbitrarily and capriciously and without observing the procedure required by law in that the Defendant, while the hearing herein was in progress and before the record was completed, indicated that he would make "determinations of wage standards applicable in the coal producing areas" and would "establish these standards at the earliest possible date" despite the statutory requirements that such determinations

Tr10 "shall be made on the record after opportunity for a hearing" (41 U.S.C.A. Sec. 43a) and on the basis of "substantial evidence" (5 U.S.C.A. Secs. 1006(c), 1009(e)(5)).

13. The aforesaid Determination is unlawful in that it was not made "on the record" as required by law but was preconceived and predetermined by the Defendant as revealed by his announcement of December 17, 1954, that "Because of the deterioration in the coal industry during the past few years it is necessary at this time, in the interest of preventing further weakening of the coal industry, to see that the fair minimum wage standards required by the Act are applied to Government purchases of coal", and as detailed in the Plaintiffs' Exceptions to the Proposed Determination.

14. The aforesaid Determination is unlawful and in excess of the Defendant's statutory jurisdiction and authority and made without observance of the procedure required by law in that the Defendant

(a) failed to give interested persons adequate notice of the hearing and the issues involved in the proceeding (5 U.S.C.A. Sec. 1004(a));

(b) failed to afford interested parties opportunity for submission and consideration of facts and arguments (5 U.S.C.A. Sec. 1004(b));

(c) failed to take or cause depositions to be taken when the ends of justice would have been served thereby (5 U.S.C.A. Sec. 1006(b)(4));

(d) failed to require proponents to sustain the burden of proof (5 U.S.C.A. Sec. 1006(c));

(e) failed to set forth in the Defendant's decision his ruling upon each exception and the "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record". (5 U.S.C.A. 1007(b)).

Tr 11 15. The aforesaid Determination is unlawful and the Defendant has acted arbitrarily, capriciously, and in abuse of his discretion by refusing to take official notice of the records of the Wage and Hour and Public Contracts Division, under his jurisdiction, or to make an independent investigation, in order to ascertain whether signatories to UMWA Agreements are in fact paying less than the wages provided for in such agreements thereby rendering the UMWA wage scales improper as a basis for said Determination.

16. The aforesaid Determination is unlawful and in excess of the Defendant's statutory authority and jurisdiction in that it is based upon wage data for the calendar year, 1953, rather than upon the currently prevailing minimum wage as required by statute (41 U.S.C.A. Sec. 35(b)). The 1953 wage data has been made obsolete by economic reverses and changes and outdated by the passage of time.

17. The aforesaid Determination is unlawful and the Defendant has acted arbitrarily, capriciously, and in abuse of his discretion in predicating his Determination upon the assumption that the existence of UMWA Agreements with coal producers establishes that the wages provided for thereunder are being paid despite evidence that many of such producers are paying wages below the agreed wage and many have either ceased doing business or ceased to be governed by the UMWA Agreement.

18. The aforesaid Determination is unlawful and the Defendant has acted arbitrarily, capriciously, and in abuse of his discretion in that he has based his Determination upon contradicted data submitted by the UMWA for the calendar year, 1953, when the record establishes that more current data is available from other reliable sources including the monthly reports which each producer is required by contract to file with the UMWA under the terms of the National Bituminous Coal Agreement of 1950 as amended.

Tr 12 19. The aforesaid Determination is unlawful and the Defendant has acted arbitrarily, capriciously, and in abuse of his discretion in that the Department of Labor compiled no wage data but relied upon the contradicted data submitted by the UMWA for the calendar year, 1953, and the Defendant based his Determination on such data, whereas in all prior determinations of the Secretary of Labor under the Walsh-Healey Act, more current and objective data has been required and in no instance has the Secretary of Labor relied solely upon union-submitted data where such data has been challenged.

20. The aforesaid Determination is unlawful and the Defendant has exceeded his statutory jurisdiction and authority and has acted arbitrarily, capriciously, and in abuse of his discretion in finding that the "23 production districts" are appropriate "localities" for the purpose of the Prevailing Minimum Wage Determination since such a finding is not supported by substantial evidence as required by the Act.

21. The aforesaid Determination is unlawful and the Defendant has acted arbitrarily, capriciously, and in abuse of his discretion by basing his findings concerning "locality" upon data which the Defendant admits was analyzed, collated, and assembled with the assistance of sources not included in the record, after the hearing and the record were closed, and without providing the Plaintiffs the opportunity of cross-examination or rebuttal in violation of Section 10 of the Walsh-Healey Act as amended (41 U.S.C.A. Sec. 43a).

22. The aforesaid Determination is unlawful and the Defendant has acted arbitrarily, capriciously and in abuse of his authority by

finding that the Defendant's post-hearing analysis, assembly, and collation of statistics and data relating to the appropriateness of his "locality" determination was justifiable in that "the parties have had an opportunity to object to the proposed evaluation and have failed to
Tr 13 point to, or tender, any evidence indicating that it is not accurate" whereas the record shows that such "locality" determination was (a) first proposed in the Defendant's Notice of Proposed Determination after the record was closed to further evidence; (b) the Plaintiffs were permitted only to submit exceptions thereto and not further evidence; and (c) the Plaintiffs submitted extensive exceptions to the proposed "locality" determination.

23. The aforesaid Determination is unlawful and the Defendant has acted arbitrarily, capriciously, and in abuse of his discretion by basing his Determination upon wage, employment, and production data which includes "captive" mines despite the uncontradicted and sole evidence that "captive" mines are not competitively within the Bituminous Coal Industry and despite the fact that evidence as to wages paid for similar work in similar industries was excluded from the record by the Hearing Officer contrary to Section 1(b) of the Walsh-Healey Act as amended (41 U.S.C.A. Sec. 35(b)).

24. The aforesaid Determination is unlawful and the Defendant has acted arbitrarily, capriciously, and in abuse of his discretion by refusing to find that the Virginia area is a separate locality despite the fact that the preponderance of the evidence establishes that such an area is an appropriate "locality" within the meaning of the Act and despite the fact that such evidence establishes that the majority of mine employees in that area are receiving a prevailing minimum wage lower than that established by the Determination.

25. The aforesaid Determination is unlawful in that the Defendant has based his findings as to the prevailing minimum wages upon evidence that is lacking in statistical validity and accuracy and is not reliable, probative, and substantial as required by law (5 U.S.C.A. Sec. 1006(c)), as for example:

(a) The evidence was not sufficient to support the issuance of any determination and, particularly, the aforesaid Determination.

Tr 14 (b) The Defendant failed to utilize the expert facilities of the Department of Labor to gather and present data relevant to the proceeding but, instead, relied entirely upon data produced by interested parties whose facilities for assembly of statistical data are lacking in competence and objectivity.

(c) The Defendant relied upon a UMWA compilation for 1953 of the signatories to their 1950 Agreement as amended, the number of employees of each, the production, and location according to the ten areas petitioned for by the UMWA as appropriate localities.

(d) The Defendant failed to obtain and introduce into the record available current data which would have provided the substantial evidence upon which a proper determination could have been based.

(e) The Defendant relied upon the existence of the wage agreement of 1950, as amended in 1952, to establish the prevailing minimum wages at the time of the hearing despite evidence tending to show that such reliance was unjustified by actual conditions in the industry.

(f) The Defendant relied upon wage data obtained by telephone by an employee of one of the petitioners who had been directed by his employer to "read the announcement of the Secretary of Labor and you prepare a case for him"

(g) The Defendant established as appropriate localities twenty-three "Districts" without substantial evidence to make such a geographical division within the objectives of the Act.

(h) The Defendant predicated his Wage Determination for each of the twenty-three "Districts" upon data that was not geographically presented or broken down at the hearing into the twenty-three "Districts".

26. The aforesaid Determination is unlawful in that the Defendant erroneously and without warrant in law overruled Plaintiffs' Exceptions to Defendant's Notice of Proposed Determination by failing to set forth his findings and conclusions and the reasons and basis therefor (5 U.S.C.A. Sec. 1007(b)).

27. By reason of each and all of the matters set forth above in Paragraphs 6 to 26, inclusive, the details of which will be fully presented in this Court, the aforesaid Determination which the Defendant has issued is unlawful and should be set aside.

28. The Plaintiffs and other parties to the aforesaid proceeding, during the pendency thereof, brought all of the foregoing considerations to the attention of the Defendant and urged them upon him; but the Pr 15 Defendant disregarded or overruled them all and issued the Determination hereinabove referred to, and announced that the Determination "shall be effective and the minimum wages hereby established shall apply to all contracts subject to the Public Contracts Act, bids for which are solicited or negotiations otherwise commenced on or after November 25, 1955".

29. The Plaintiffs and each of them are adversely affected and aggrieved by the aforesaid Determination of the Defendant and will be irreparably injured and damaged if it is allowed to go into effect;

The Plaintiffs are informed and believe that various purchasing agencies of the United States Government will shortly seek to purchase bituminous coal produced by the Plaintiffs and will solicit bids for the supply thereof;

The Plaintiffs cannot without prohibitively increasing their operating costs comply with the terms of the aforesaid Determination, and in the absence of such compliance, the aforesaid purchasing agencies of the United States Government cannot and will not purchase the bituminous coal produced by the Plaintiffs;

Thus the Plaintiffs will be denied the production of bituminous coal for purchase by the United States Government and will suffer the

loss of profitable contracts unless they comply with the aforesaid Determination and thereby increase their operating costs beyond their ability to remain in business;

Those operators now paying wages equal to the prevailing minimum wages prescribed in the aforesaid Determination are for the most part large, mechanized mines, having high productive capacities and with which the Plaintiffs cannot compete at the proposed wage levels unless they expend large sums for mechanization which they are economically unable to do, since most of them are mining narrow seams or limited acreages of coal deposits which make mechanization relatively prohibitive in cost;

Tr16 Many of the Plaintiffs supply coal to the Tennessee Valley Authority which uses a lower grade of coal, making the large and expensive cleaning and preparation plants maintained by the large operators unnecessary in order to furnish such coal;

If the Plaintiffs shall be required to comply with the terms of the aforesaid Determination they will be required to increase not only their prevailing minimum wage rates, which are $1.25 per hour and in excess of the minimum established under the Fair Labor Standards Act, but all their wage rates both for government and non-government business. These increases will in turn raise the price of coal to such an extent that the Plaintiffs will be unable to compete with the large mechanized mines for government business and will also have difficulty in marketing coal to non-government consumers in competition with other fuels, thereby causing widespread unemployment and great damage to the Plaintiffs;

The Plaintiffs are peculiarly dependent upon purchases by agencies of the United States Government of the coal produced by them due to a decrease in the public consumption of bituminous coal because of a switch to competing fuels and due to the geographical isolation of the Plaintiffs from the principal non-governmental markets for such coal;

If the aforesaid Determination is made effective on November 25, 1955, then the increases in the Plaintiffs' costs, loss of profits, and

the impairment of their market will take place, as the Plaintiffs are informed and believe, while this case is still pending decision in the courts;

For such increases in their operating costs, loss of profits, and impairment of their markets, the Plaintiffs would have no redress or recovery whatever and would thereby be irreparably injured and damaged; and

All of the foregoing would be brought about by unlawful means, namely, the placing into effect of the Defendant's aforesaid unlawful Determination.

Tr 17 WHEREFORE, the Plaintiffs pray the Court:

That the Defendant be directed to certify and transmit to this Court the entire record in the proceeding above referred to in order that this Court may fully review the same;

That judgment be entered declaring the aforesaid Determination of the Secretary of Labor to be unlawful and void;

That the aforesaid Determination be permanently stayed from going into effect and that the Defendant, and his agents and representatives and successors in office, be permanently restrained and enjoined from in any manner putting the said Determination into effect or notifying any contracting officer or purchasing agency of the United States Government that adherence to the terms of said Determination should be made a condition of any bid or contract for the purchase of bituminous coal by any agency of the United States Government;

That pending a complete review and adjudication of this cause, the aforesaid Determination be stayed from going into effect and that the Defendant, and his agents and representatives and successors in office, be enjoined from in any manner putting the said decree or determination into effect or notifying any contracting officer or purchasing agency of the United States Government that adherence to the terms of said Determination should be made a condition of any bid or contract for the purchase of bituminous coal by any agency of the United States Government; and

That the Plaintiffs be granted such other and further relief as the Court may deem just and proper.

LANDIS, COHEN, RUBIN AND SCHWARTZ

By Wallace M. Cohen
1832 Jefferson Pl., N.W.
Washington, D.C.

FRED B. GREEAR, Norton, Virginia

H. CLAUDE POBST, Grundy, Virginia

T. G. SHUFFLEBARGER, Grundy, Virginia

Attorneys for the Plaintiff

Tr 1[Filed December 6, 1955]

AMENDMENT TO COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Come now the Plaintiffs in the above-entitled action and amend the Complaint for Declaratory Judgment and Injunctive Relief as follows:

A. By adding at the end of Paragraph 4:

"In making his Determination for the Bituminous Coal Industry the Defendant in effect determined that bituminous coal may not 'usually be bought in the open market' and it is, therefore, not exempt under Section 9 of the Walsh-Healey Public Contracts Act, as amended (41 U.S.C.A. Secs. 35-45)."

B. By adding at the end of Paragraph 6:

"The Plaintiffs request a declaratory judgment as to whether said new National Bituminous Coal Agreement renders invalid the determination by the Defendant that the wages provided for in the old Agreement are the currently prevailing minimum wages in the Bituminous Coal Industry.

C. By adding at the end of Paragraph 8:

"The Plaintiffs request a declaratory judgment as to whether a 'locality' composed of seven states and parts of two others is

an appropriate 'locality' within the meaning of the Act".

Tr 2 D. By adding at the end of Paragraph 9:

"The effect of this ruling is to subject the Plaintiffs and their future contracts with the Government to the Wage Determination and to cause them irreparable and unlawful injury even though the Defendant may at some later date hold a hearing as to the applicability of the 'open market' exemption to the Bituminous Coal Industry. The Plaintiffs request a declaratory judgment as to whether the Defendant acted lawfully in refusing to consider the Plaintiffs' contention that the purchase of bituminous coal is exempt from the Act and that the refusal so to rule had the effect of a ruling against that contention thus, in violation of the Act, denying the Plaintiffs the opportunity for a hearing".

E. By adding at the end of Paragraph 10:

"The Plaintiffs request a declaratory judgment as to whether portal-to-portal compensation can lawfully be included in the wages determined to be the prevailing minimum wages in an industry where many of its members do not by custom, practice or contract make portal-to-portal payment".

F. By adding at the end of Paragraph 14:

"The Plaintiffs request a declaratory judgment as to whether the procedure adopted by the Defendant in wage determination proceedings conforms to the requirements of the Administrative Procedure Act".

G. By adding at the end of Paragraph 15:

"The Plaintiffs request a declaratory judgment as to whether the Defendant's refusal to take official notice of records under his jurisdiction or to make an investigation of the wages actually being paid in the Bituminous Coal Industry is unlawful".

H. By adding at the end of Paragraph 17:

"The Plaintiffs request a declaratory judgment as to whether the wages provided for in a union agreement can be presumed to be the prevailing minimum wages even though there is evidence

Tr 3 that the wages provided for in such agreement are not always paid but that lower wages are paid".

I. By adding at the end of Paragraph 23:

"The Plaintiffs request a declaratory judgment as to whether the Defendant may lawfully include wages paid in 'captive' mines in making a determination of the prevailing minimum wages for the Bituminous Coal Industry".

J. By striking out Paragraph 24 and inserting the following:

"24. The aforesaid Determination is unlawful and the Defendant has acted arbitrarily, capriciously and in abuse of his discretion by refusing to find that the Virginia area, consisting of the counties of Wise, Dickinson, Lee, Russell, Scott and parts of Buchanan and Tazewell, and the Kentucky area consisting of the counties of McCreary, Pulaski, and the Western part of Whitley, are each separate localities despite the fact that the preponderance of the evidence establishes that each such area is an appropriate 'locality' within the meaning of the Act and despite the fact that such evidence establishes that the majority of mine employees in each such area is receiving a prevailing minimum wage lower than that established by said Determination".

K. By adding at the end of Paragraph 26:

"The Plaintiffs request a declaratory judgment as to whether, under the Administrative Procedure Act, the Defendant is required to set forth his findings, conclusions and basis therefor with respect to each of the Plaintiffs' Exceptions to the Proposed Determination".

LANDIS, COHEN, RUBIN AND SCHWARTZ
By: Wallace M. Cohen
FRED B. GREEAR, Norton, Virginia
H. CLAUDE POBST, Grundy, Virginia
T. G. SHUFFLEBARGER, Richlands, Va.
Attorneys for the Plaintiffs

Tr 4 [SERVICE]

Tr 1 [Filed November 29, 1955]

REQUEST FOR ADMISSION UNDER RULE 36

Plaintiffs, Ruth Elkhorn Coals, Inc., et al, request the Defendant, James P. Mitchell, Secretary of Labor, within ten days after service of this Request, to make the following admission of the truth of the following matters of fact, relevant to this proceeding:

* * * * * *

Tr 2 (7) That the wage agreement in effect on February 1, 1955, between the United Mine Workers of America and operators in the Bituminous Coal Industry, in the area embracing said "Districts" 1, 2, 3, 4, 6, 7, 8 and 10, provided for a minimum hourly wage which was based upon a formula which included as a separate element payment for travel time from the portal of the mine to the point of beginning work and from the point of leaving work to the portal, or, as it is called, portal-to-portal pay.

* * * * * *

Tr 3 (10) The wage data and the data relating to the individual mines, their location, employment and production, when received in evidence at the hearing in the Wage Determination proceeding were not divided into twenty-three "Production Districts".

(11) The data referred to in (10) above were broken down by the Defendant into twenty-three "Production Districts" after the hearing and record in said proceeding were closed and with the aid of information which was not offered in evidence at said hearing.

(12) The data referred to in (10) and (11) above included information as to wages, employment and production with respect to "captive" mines, but such information as to "captive" mines was not separated from the data as to commercial mines.

LANDIS, COHEN, RUBIN AND SCHWARTZ

By: Wallace M. Cohen

* * *

FRED B. GREEAR * * *
H. CLAUDE POBST * * *
T. G. SHUFFLEBARGER * * *
Attorneys for the Plaintiffs

Dated: November 29, 1955.

[SERVICE]

Tr 1 [Filed December 12, 1955]

DEFENDANT'S ANSWER TO PLAINTIFFS' REQUEST FOR ADMISSION

Defendant, answering plaintiffs' request for admissions under Rule 36, respectfully submits that the request is improper for the reason that such admissions are immaterial and irrelevant to the issues in this case, because the jurisdiction of the Court is limited, under the Fulbright Amendment (41 U.S.C. 43a), to a review of the administrative record heretofore filed herein. Subject to the foregoing reservation and solely for the purpose of avoiding delay in this litigation, defendant submits the following responses to the requests:

* * * * * *

Tr 2 7. It is admitted that the wage agreement provides for a minimum daily wage which includes portal-to-portal pay. It is believed that the minimum hourly wage is based upon $17.96 (the daily wage) divided by 8 hours (the working day inclusive of travel time), and that travel time is compensated at the same rate of pay as hours worked at the face.

* * * * * *

10. This statement is not true for all production districts. It is admitted, except as shown in answer 11 below.

11. Denied. The addresses shown in the record for union mines included town and State. All mines in the same State, or in some cases, specific parts of States, were listed together. In the cases of six Districts which are the equivalent of States no retabulation of the data was necessary. These Districts are 4 (Ohio), 10 (Illinois), 11 (Indiana), 12 (Iowa), 20 (Utah), and 22 (Montana). In addition, no processing was

Tr 3 required for District 9 (West Kentucky). In the case of four other Districts it was necessary only to add the totals for the various States or parts thereof to obtain District totals. This is true of 13 (Alabama, Georgia, Southern Tennessee), 19 (Wyoming, Idaho), 21 (North Dakota, South Dakota), and 23 (Washington, Oregon). In the case of the remaining

Districts in which States containing two or more Districts were involved, it was necessary to allocate each mine to the appropriate District on the basis of the town of location. This involved the use of standard reference works such as a Postal Guide to determine the county, since the Districts in these cases are defined in terms of counties. In the case of five districts, involving counties traversed by a District line, maps were of assistance in locating the District line and allocating mines to their appropriate Districts on the basis of the town of location. In the case of four of the five Districts involving split counties (all but Dist. 7), union mines in these counties may be omitted without affecting the conclusion that a majority of the tonnage and employment in the District is accounted for by UMWA mines.

12. The data referred to in 10 and 11 above includes information as to wages, employment, and production with respect to all mines in the Bituminous Coal Industry as defined in the determination of the Secretary; to the extent that this group includes mines which plaintiff describes as "captive" there was no separation of data.

/s/ August F. Cantfil

Subscribed and sworn to before me,
a notary public in and for the District
of Columbia, this 9th day of December, 1955.

/s/ Edward V. J. Molner

My Commission expires March 15, 1957

[CERTIFICATE OF SERVICE]

Tr 1 [Filed January 6, 1956]

ANSWER

Now comes the defendant James P. Mitchell, Secretary of Labor, by his attorneys, and for answer to the complaint as amended alleges as follows:

FIRST DEFENSE

1. Defendant denies the allegations of paragraph 1 of the complaint for lack of knowledge and information sufficient to form a belief. Defendant alleges that the complaint does not include a list of plaintiffs in such form that defendant is fairly apprised of the identities of the plaintiffs and alleges further that he is without knowledge or information sufficient to enable him to identify them.

2. Defendant denies the allegations of paragraph 2 of the complaint for lack of knowledge and information sufficient to form a belief.

3. Defendant admits the allegations of paragraph 3 of the complaint.

4. Defendant alleges that the recommendation quoted in paragraph 4 of the complaint that "the Secretary of Labor should pursue his present policy of making determinations of wage standards applicable in the coal producing areas and should establish these standards at the earliest possible date" was a recommendation of the President's Advisory Committee on Energy Supplies and Resources Policy, a group of Cabinet

Tr 2 officers in charge of the Departments of State, Treasury, Defense, Justice, Interior, Commerce and Labor, and the Director of the Office of Defense Mobilization. The Secretary of Labor in no way disasociates himself from the recommendation but alleges on the contrary that the policy of the Committee, as so stated, had his full support. Defendant denies that he determined that bituminous coal may not usually be bought in the open market, and further denies that he determined whether it is or is not exempt under Section 9 of the Walsh-Healey Public Contracts Act. He alleges that he ruled that the "open market" exemption was a matter not properly raised at the administrative hearing, and further

alleges that his Notice of Proposed Determination, which is before this Court and of which plaintiffs are fully aware, shows this to have been his ruling. Defendant admits the remaining allegations of paragraph 4.

5. Defendant admits that the production or furnishing of bituminous coal under contracts with the United States Government or agencies thereof would subject plaintiffs and others to the prevailing minimum wage determination for the bituminous coal industry unless said determination is set aside. Defendant denies the remaining allegations of paragraph 5 for lack of knowledge or information sufficient to form a belief.

6. Defendant denies that the determination purports to establish as the prevailing minimum wages for the bituminous coal industry the wages provided for in the National Bituminous Coal Agreement of 1950, as amended September 29, 1952, and alleges that it purports to determine and does determine the prevailing minimum wages for each district shown in the determination without reference to whether or not the prevailing minimum wage for any district coincides with those provided for in said Agreement or any other agreement. Defendant further alleges that the prevailing minimum wage for each district was determined
Tr 3 on the basis of substantial evidence on the record of the hearing. Defendant admits that since the record was closed certain coal producers have neogitiated an agreement for higher wage rates but evidence of these negotiations and of their effect, if any, upon the level of prevailing minimum wages in each district does not and could not have appeared in the record. Except as herein admitted the allegations of paragraph 6 of the complaint are denied.

7. Defendant denies that the determination is unlawful in any respect and, in particular, denies that the paragraph of the Secretary's Notice of Proposed Determination quoted in paragraph 7 of the complaint is an attempt to apply standards contrary to the Act.

8. Defendant denies the allegations of paragraph 8 of the complaint and, in particular, denies that the determination of the same wage

for 8 districts amounts to the establishment of a "locality." Defendant alleges that the record contains substantial evidence that the prevailing minimum wage determined for each of those 8 district did, in fact, prevail in each of them.

9. Defendant admits that he has refused to consider, and has ruled that there cannot be raised in this proceeding, the plaintiffs' contention that bituminous coal is a commodity "that may usually be bought in the open market" and is exempt therefore from the coverage of the Act. Defendant denies that such refusal and ruling are unlawful or in excess of his statutory jurisdiction and authority. The remaining allegations of paragraph 8 of the complaint are denied.

10. Defendant admits that the sum of daily wages shown in the record, which defendant considered in arriving at his determination of hourly wages included "portal to portal" pay. The defendant, having determined the minimum wage not on a daily but on an hourly basis
Tr 4 knows of no reason why the plaintiffs, or any of them, should feel bound to pay for "portal to portal" time unless they are required to do so by contract or by virtue of the Portal to Portal Act. Defendant further alleges that the "portal to portal" question was not before him at the administrative hearing, which was concerned only with the wage level and the other matters stated in the notice of hearing.

11. Defendant denies the allegations of paragraph 11 of the complaint.

12. Defendant repeats and realleges the allegations of paragraph 4 of this answer. Except as they are there admitted, the allegations of paragraph 12 of the complaint are denied.

13. Defendant admits the making of the announcement alleged in paragraph 13 of the complaint. The remaining allegations of that paragraph are denied.

14. Defendant denies each and every allegation of paragraph 14 of the complaint, except that he admits that depositions were not taken.

15. Answering paragraph 15 of the complaint, defendant alleges that he took no official notice of the records of the Wage and Hour and

Public Contracts Division of the Department of Labor for the reason that they contained no information pertinent to the issues presented at the hearing. Defendant alleges that he offered all interested parties opportunity to present any facts available to them relative to actual payments by signatories to UMWA agreements. Defendant admits that he made no independent investigation of this question. Except in so far as heretofore admitted, the allegations of paragraph 15 are denied.

16. The defendant admits that much of the wage data relates to the calendar year 1953 and alleges that such data were the most recent
Tr 5 data available on the industry which were of enough detail to be sufficient for the purpose of the proceedings. The remaining allegations of paragraph 16 are denied.

17. The defendant denies that he predicated his determination upon the assumption alleged in paragraph 17 of the complaint. He alleges that the contentions of this paragraph were considered in the light of the evidence in the record and discussed in his notice of proposed determination at pages 23 to 25. The remaining allegations of paragraph 17 are denied.

18. Defendant denies that his determination was arbitrary, capricious or in abuse of his discretion in so far as he based it upon data submitted by the UMWA for 1953. He respectfully refers this Court to the record itself to determine "what the record established" and denied that he was required to use the data referred to in paragraph 18 of the complaint.

19. Defendant denies that his reliance upon UMWA data for 1953, insofar as he relied upon it, was arbitrary, capricious or in abuse of his discretion, and further denies that he is bound, in making a determination to rely upon or refrain from relying upon particular types of data considered in the making of other determinations.

20. Defendant denies each and every allegation of paragraph 20.

21. Defendant admits that the analysis, collation, and assembly of data took place after the hearing and record were closed, but denies

that the determination is based upon sources not included in the record, and denies the remaining allegations of paragraph 21 of the complaint.

22. Defendant denies that he acted arbitrarily, capriciously or in abuse of his authority with respect to the appropriateness of his locality determination. He alleges that the question of the determination was designated in the notice of hearing and in the press release announcing the hearing and that all interested persons, including the plain-
Tr 6 tiffs, had ample opportunity to submit such evidence as they desired with respect to this question.

23. The defendant admits that the determination was based upon wage, employment, and production data which included "captive" mines and alleges as such mines fall within the definition of the industry he properly considered such data in making a prevailing minimum wage determination on the basis of the particular industry.

24. The defendant admits that he refused to find that either of the areas mentioned in paragraph 24 of the complaint is a separate locality and alleges that his refusal so to find is justified by evidence in the record and is neither arbitrary, capricious, nor in abuse of his discretion.

25. The defendant denies that he based his findings upon evidence lacking in statistical validity and accuracy and alleges that his determination was in all respects made on the basis of reliable, probative and substantial evidence, as required by law.

26. The defendant denies the allegations of paragraph 26 of the complaint and alleges that he ruled fully and in proper form as to all matters of fact, law and discretion which were before him, as required by 5 U.S.C. Sec. 1007(b).

27. Defendant denies each and every allegation of paragraph 27 of the complaint except in so far as such allegations are specifically admitted in the preceding paragraphs hereof.

28. Defendant admits the allegations of paragraph 28 of the complaint, except that he denies disregarding any considerations properly brought before him.

29. Defendant admits that many of the plaintiffs supply coal to the Tennessee Valley Authority and admits that various purchasing agencies of the United States will shortly seek to purchase bituminous coal and will solicit bids for the supply thereof. Defendant denies that the placing into effect of the prevailing minimum wage determina-
Tr 7 tion for the bituminous coal industry is in any way unlawful, and for lack of knowledge and information sufficient to form a belief denies each and every other allegation of paragraph 29 of the complaint.

SECOND DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

THIRD DEFENSE

The Court is without jurisdiction of this action, in that there exists no case or controversy within the meaning of Article 3 Secs. 1 and 2 of the Constitution of the United States.

FOURTH DEFENSE

Plaintiffs, and each of them, lack standing to sue in that they fail to qualify as persons "adversely affected or aggrieved" by reason of any acts of the defendant, within the meaning of Section 10(b) of the Walsh-Healey Public Contracts Act, as amended.

FIFTH DEFENSE

There is no actual controversy between plaintiffs and defendant within the meaning of the Declaratory Judgments Act (28 U.S.C. 2201).

SIXTH DEFENSE

Plaintiffs have an adequate remedy at law with respect to all matters alleged in the complaint.

SEVENTH DEFENSE

The determination of the prevailing minimum wage for the bituminous coal industry is valid and subsisting and has been duly rendered and promulgated in accord with applicable law.

Tr 8 WHEREFORE, defendant prays that the complaint be dismissed, and that he recover his costs and disbursements herein.

LEO A. ROVER
United States Attorney

EDWARD H. HICKEY

ARTHUR H. FRIBOURG
Attorneys, Department of Justice

Of Counsel:

STUART ROTHMAN
Solicitor
BESSIE MARGOLIN
Assistant Solicitor
WILLIAM A. LOWE
Attorney, Department of Labor

[CERTIFICATE OF SERVICE]

[Filed May 23, 1956]

ORDER

This case was heard on consolidated motions by defendant to dissolve the preliminary injunction and for summary judgment, and the Court having considered the motions, the pleadings, the affidavits, the request for admission and responses thereto, the record of the administrative proceedings filed herein, and counsel for the parties having been heard, it is on this 23rd day of May, 1956

ORDERED, ADJUDGED and DECREED as follows:

1. That defendant's motion to dissolve the preliminary injunction granted by this Court November 22, 1955 is granted, and that said injunction be and hereby is dissolved.

2. That defendant's motion for summary judgment be and hereby is granted, and the defendant's prevailing minimum wage determination for the bituminous coal industry issued October 26, 1955 is hereby declared to be in all respects valid

3. It is further ORDERED that the plaintiffs pay the costs of these proceedings, to be taxed by the Clerk of this Court.

Dated: May 23, 1956.

JUDGE

BEFORE THE SECRETARY OF LABOR
OF THE UNITED STATES

(Submitted and filed of Record Feb. 1, 1955)

MOTION FOR HEARING ON JURISDICTION OF SECRETARY OF LABOR

The hearing on the Petition of United Mine Workers of America, the Pittsburgh Consolidation Coal Company, and the Pocahontas Fuel Company, for the fixing of minimum wage rates for the Bituminous Coal Industry, under the provisions of the Walsh-Healey Public Contracts Act.

The undersigned, Bardo Coal Mining Company, Big Jim Coal Company, Blue Diamond Coal Company, C. & C. Coal Company, Closplint Coal Company, Clover Darby Coal Company, Clear Fork Coal Company, Cornett-Lewis Coal Company, Crummies Creek Coal Company, Dartmont Coal Company, Dixie-Darby Fuel Company, Garmeda Coal Company, Harlan Collieries Coal Company, Harlan Fuel Company, Harlan Wallins Coal Corporation, High Splint Coal Company, Imperial Harlan Coal Company, Kentucky Cardinal Coal Corporation, Mary Alice Coal Mining Company, Mary Helen Coal Corporation, Mill Ridge Coal Company and V & C Coal Company, state that each of them is engaged in the production and sale of bituminous coal, and that the mines of each are located entirely in Harlan County, Kentucky, with the exception of the mines of C. & C. Coal Company, Big Jim Coal Company and Garmeda Coal Company, each of which is located entirely in Bell County, Kentucky, adjoining Harlan County, Kentucky, and the mine of Kentucky Cardinal Coal Corporation, which is located partly in each of those counties.

Each of said companies has been engaged in the production and sale of bituminous coal at its present location for many years. Each of said companies is a member of the Harlan County Coal Operators Association, and each is now, and for several years has been, operating under a contract with the United Mine Workers of America in force in District #19, United Mine Workers of America.

The companies hereinabove mentioned, in the aggregate, have a total annual production in excess of 3,150,000 tons, and employ, in the aggregate, in excess of 3,100 men. Each desires, from time to time, to contract with different agencies and departments of the United States Government for supplying to such agencies or departments, bituminous coal; and, therefore, each has a vital interest in the effort sought in this proceeding to impose upon the Bituminous Coal Industry a minimum wage scale under the provisions of the Walsh-Healey Public Contracts Act.

By the express provisions of Section 9 of the Walsh-Healey Public Contracts Act, it is stated that the provisions thereof "shall not apply to purchases of such materials, supplies, articles or equipment as may usually be bought in the open market." Bituminous coal is a "material" and an "article" within the meaning of Section 9 of said Act, and may usually be bought, and is usually bought, in the open market. Therefore, the Honorable Secretary of Labor is without any authority under the provisions of said Act, or any other law of the United States, to conduct any hearing for the purpose of fixing a minimum wage scale for the Bituminous Coal Industry or for that portion thereof represented by the operations of the companies hereinabove named, and is without any authority to fix or enforce a minimum wage scale for that industry, or any part of it, under the terms of said Act.

For the foregoing reasons, the companies hereinabove named, individually and collectively, object to the Honorable Secretary conducting such a hearing for fixing such minimum wage scale for the Bituminous Coal Industry and to the fixing of such wage scale.

They ask that this objection to the jurisdiction of the Secretary of Labor in the premises be determined and passed upon in advance of any hearings in respect of such proposed minimum wage scale, and that upon consideration of the objection, it be ruled and adjudged that the Bituminous Coal Industry, including that portion thereof represented by the operations of the companies herein named, is expressly excluded by Section 9 of the Walsh-Healey Public Contracts Act from those industries and businesses in respect of which the Secretary is given the power to fix minimum wages.

There are filed herewith, as a part hereof, the affidavits of Bryan W. Whitfield, Jr., Charles S Guthrie, L. P. Johnson and Frank Bassham, in support of this objection

BARDO COAL MINING COMPANY
BLUE DIAMOND COAL COMPANY
CLOSPLINT COAL COMPANY
CLEAR FORK COAL COMPANY
CRUMMIES CREEK COAL COMPANY
DIXIE-DARBY FUEL COMPANY
HARLAN COLLIERIES COAL COMPANY
HARLAN WALLINS COAL CORPORATION
IMPERIAL HARLAN COAL COMPANY
MARY ALICE COAL MINING COMPANY
MILL RIDGE COAL COMPANY
KENTUCKY CARDINAL COAL CORP.
MARY HELEN COAL CORPORATION
V & C COAL COMPANY
BIG JIM COAL COMPANY
C. & C. COAL COMPANY
CLOVER DARBY COAL COMPANY
CORNETT-LEWIS COAL COMPANY
DARTMONT COAL COMPANY
GARMEDA COAL COMPANY
HARLAN FUEL COMPANY
HIGH SPLINT COAL COMPANY

BY (Illegible)
Attorney

(Filed as part of record Feb 1, 1955)

In the Matter of:

The hearing on the application of United Mine Workers of America, The Pittsburgh Consolidated Coal Company and the Pocahontas Fuel Company, for the fixing of minimum wage rates for the bituminous coal industry, under the provisions of the Walsh-Healey Public Contracts Act.

AFFIDAVIT

The affiant, Frank Bassham, states that he is the Exec. Vice President of Harlan Wallins Coal Corp., a corporation engaged in the mining and selling of bituminous coal from its mines in Harlan County, Kentucky; that said company has been engaged in that business at that location for more than 25 years; that he is in general charge of the operations of said company and has full knowledge, not only of its production methods, but of its practices in respect of the sale of the coal produced at said mine; that the coal is not mined to the specifications of individual purchasers, but all of same is produced and graded in the same manner and substantially all of the coal produced is sold on the open market to purchasers, from day to day. He is acquainted with the practices observed by the producers of bituminous coal, not only in the area where his mine is located, but in the other bituminous areas of the United States and he states that bituminous coal may usually be bought in the open market in any and all of the bituminous coal fields in the United States.

His company produced and sold 253,021 tons of coal in the calendar year 1954. He is familiar with the operation of each of the companies named in the objection to the jurisdiction of the Secretary of Labor to which this Affidavit is attached, and the operation of each of said companies is located in the same bituminous coal field as is his own mine and practically all of them in the same county in Kentucky. He is familiar with the production of those companies and with their methods of disposing of their coal; that the aggregate production of those companies in

1954 was approximately 3,150,000 tons, and that the coal produced by each of those companies in the past could be and now can be usually purchased in the open market.

/s/ Frank Bassham

Subscribed and sworn to before me by Frank Bassham, this 29th day of January, 1955

My commission expires December 1, 1958

/s/ W. H. Noel, Notary Public
Harlan County, Kentucky.

UMW EXHIBIT 8-A

TONNAGE PRODUCED BY SIGNATORIES AS A PERCENT OF TOTAL PRODUCTION
(1953)

LOCALITY	TONNAGE PRODUCED BY SIGNATORIES	TOTAL TONNAGE	PERCENT PRODUCED BY SIGNATORIES
TOTAL	377,643,840	447,487,020	84.39%
A	316,345,136	366,438,090	86%
B	15,665,028	15,812,485	99%
C	12,405,223	21,203,627	59%
D	13,431,335	14,542,472	92%
E	2,528,565[1]	8,229,381	31%[1]
F	3,566,825	4,112,648	87%
G	1,800,694	2,802,558	64%
H	466,418[2]	1,873,137	25%[2]
I	10,750,057	11,787,860	91%
J	684,559	684,762	99%

1 Attached is Exhibit J for adjusted information on Locality E
2 Attached is Exhibit I for adjusted information on Locality H

UMW Ex. 8-D

VIRGINIA (Page 1)

NAME OF COAL COMPANY	NAME OF MINE	ADDRESS OF MINE	TONNAGE	EMPLOYEES
Abbott Coal Company	DO	Keen Mt.	12,000	19
(c) Adkins Coal Co.	DO	Long Branch	3,500	7
William A. Altizer	DO	Jewell Valley	6,000	5
Anderson and Ratliff Coal Company	DO	Jewell Valley	419	3
Baker Coal Company	DO	Freemont	25,000	19
Bandy Coal Company	DO	Jewell		3
(c) (*) Banner Fuel Co.	Cranes Nest	Cranes Nest	134,868	140
(c) (*) Banner Splashdam Coal Company	Red Banner	Wakenva	124,185	104
Bartlick Mining Corp.	DO	Bartlick	8,550	150
Belcher and Son Coal Company	DO	Conaway	14,000	6
Benedict Coal Corp.	DO	St. Charles	(k) 202,833	160
Big Branch Coal Co.	DO	Big Branch		
Big Mountain Coal Company, Incorporated	DO	St. Charles		

(Page 2)

(c) Black Water Coal Co.	DO	Blackwood	430	5
Black Diamond Coal Co.	DO	McCoy		
Black Fox Coal Co.	Clevenger No. 1	Convict Hollow		
(c) (*) Blackwood Fuel Co.	Calvin Mines	Calvin	(k) 141,810	140
	Pardee Mine	Pardee	(k) 166,773	240
Blankenship and Owens (Formerly Basil Bailey)		Poplar Mt. #1 Hill	10,000	9
Bledsoe and Miller (Formerly (a) Kegley Coal Co. (b) Sturgill & Van Sant)	DO	Mud Creek		
(*) Blue Diamond Coal Co.	(c) Mayflower	Bonny Blue		
	Monarch	Leona Mines		
	Toms Creek	Wise County		
	Bonny Blue Mine	------	513,063 (x)	773 (x)
(c) Blue Diamond Coal Co.	DO	Harman		1
Bowles and Lester	--------	Elkwick Branch		

NAME OF COAL COMPANY	NAME OF MINE	ADDRESS OF MINE	TONNAGE	EMPLOYEES
Boyd, Brown, Shelton and Balls	- - - - - - - -	Raven		
Brown and Adkins Coal Company	DO	Jewell Valley	600	9

(Page 3)

James Brummitt	DO	Bear Branch	124	1
Buchanan County Coal Corporation	Buchanan 1 & 2	Big Rock	(k) 439, 389	500
Buchanan Fuel Company	Loading Ramp	Big Rock		
C. and C. Coal Company	DO	Poplar Mt.		
C. H. Coal Company (Formerly C., H. & D. Coal Co.)	DO	Harman		4
C. and L. Coal Company	DO	Page		8
Carroll Coal Company	DO	Red Ash	5,400	
Central Coal Company	W. K.	Jewell Valley	2,340	5
R. S. Clevinger Coal Company	R. S.	Conaway	9,000	4
Norman Clifton	N. C.	Jewell Valley		26
Clinchfield Coal Corp.	No. 2	Dante		
	No. 52			
	No. 56			
	No. 9	Clinchco		
	Meade Mine	Pound		
	Moss Mine	Clintwood		
	Lick Mine	Clintwood		
	Hurrican Mine	- - - - -	4, 982, 765	2,285

(Page 8)

Riley Hou[illegible] Coal Co.	Hou[illegible]	Hill Creek	24	2
Irvin Coal [illegible]	DO	Lick Branch	48	5
Co. C.E.C. Coal Co.	DO	Roscaun		6
C. R. L. Jessee [illegible]	DO	Potts Branch	31	5
Jewell Smoke Coal Corporation	Jewell Ridge No. 1	Tazewell	(k) 305, 232	350
	Jewell Valley No. [illegible]	Buchanan	(k) 600, 344	1[illegible]
	No. 3 Strip Camp	Jewell Valley	(k) [illegible]	200
[illegible] Coal Company		Jewell Fork	14,000	14
[illegible]	DO	Jewell Valley	[illegible]	11

NAME OF COAL COMPANY	NAME OF MINE	ADDRESS OF MINE	TONNAGE	EMPLOYEES
Joy Coal Company	DO	Roseann		4
Keen Coal Company	K. and C.	Jewell Valley		4
Keene and Presely Coal Co.	DO	Jewell Ridge	170	4
(c) King Coal Mining Corporation	DO	Elys Creek (1952 k)	25, 543	62
(c) Vaughn Kirk Coal Co.	DO	Elys Creek		

UMW Ex. 7

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950 AS AMENDED SEPTEMBER 29, 1952

Effective October 1, 1952

* * * * * *

WAGES

Amend the "WAGES AND HOURS" section of the National Bituminous Coal Wage Agreement of 1950 by striking out of subsection (d) of said section the words and figures "Four Dollars and Seventy-five Cents ($4.75)" and inserting in lieu thereof the words and figures "Eight Dollars and Twenty-five Cents ($8.25)".

* * * * * *

UMW Ex. 5

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950

Effective March 5, 1950, to June 30, 1952
Executed at Washington, D. C., March 5, 1950

* * * * * *

WAGES AND HOURS

1. (a) For all inside employees a work day of eight hours from portal to portal is established, including a staggered thirty minutes for lunch, and without any intermission or suspension of operation throughout the day. For inside day workers these eight hours shall be paid for at straight time rate. Overtime beyond eight hours per day and forty hours per week shall be paid for at time and one-half with no pyramiding of overtime. Straight time rates for inside day workers shall be the total daily normal shift earnings for eight hours divided by eight (8) hours.

(b) For all outside employees except those covered in paragraph (c) hereof (including all strip mine and coke oven employees), a work day of seven hours and fifteen minutes is established including a staggered thirty minutes for lunch, and without any intermission or suspension of

operations throughout the day. These seven hours and fifteen minutes shall be paid for at straight time rate. Overtime beyond seven hours and fifteen minutes per day and thirty-six and one-quarter hours per week shall be paid for at time and one-half with no pyramiding of overtime. Straight time earnings for outside day workers covered by this paragraph shall be the total daily normal shift earnings for seven hours and fifteen minutes divided by seven and one-quarter (7.25) hours.

(c) For all outside continuous employees who are engaged at power houses, sub-stations and pumps operating continuously for twenty-four (24) hours daily, and hoisting engineers, a work day of eight hours is established, including a staggered thirty minutes for lunch and without any intermission or suspension of operations throughout the day. These eight hours shall be paid for at straight time rate. Overtime beyond eight hours per day and forty hours per week shall be paid for at time and one-half with no pyramiding of overtime. Straight time earnings for day workers covered by this paragraph shall be the total daily normal shift earnings for eight hours divided by eight (8) hours.

(d) All mine workers, whether employed by the month, day, or tonnage, yardage, deadwork or footage rate, shall receive Four Dollars and Seventy-five Cents ($4.75) per day in addition to that provided for in the contract which expired March 31, 1946.

* * * * * *

UMW Ex. No. 3

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1947

Effective July 1, 1947, to June 30, 1948
Executed At Washington, D.C. July 8, 1947

* * * * * *

WAGES AND HOURS

1. (a) For all inside employees a work day of eight hours from portal to portal is established, including a staggered thirty minutes for lunch, and without any intermission or suspension of operations throughout the day. For inside day workers these eight hours shall be

paid for at straight time rate. Overtime beyond eight hours per day and forty hours per week shall be paid for at time and one-half with no pyramiding of overtime. Straight time rates for inside day workers shall be the total daily normal shift earnings for eight hours divided by eight (8) hours.

(b) For all outside employees except those covered in paragraph (c) hereof (including all strip mine and coke oven employees), a work day of seven hours and fifteen minutes is established, including a staggered thirty minutes for lunch, and without any intermission or suspension of operations throughout the day. These seven hours and fifteen minutes shall be paid for at straight time rate. Overtime beyond seven hours and fifteen minutes per day and thirty-six and one-quarter hours per week shall be paid for at time and one-half with no pyramiding of overtime. Straight time earnings for outside day workers covered by this paragraph shall be the total daily normal shift earnings for seven hours and fifteen minutes divided by seven and one-quarter (7.25) hours.

(c) For all outside continuous employees who are engaged at power houses, sub-stations and pumps operating continuously for twenty-four (24) hours daily, and hoisting engineers, a work day of eight hours is established, including a staggered thirty minutes for lunch and without any intermission or suspension of operations throughout the day. These eight hours shall be paid for at straight time rate. Overtime beyond eight hours per day and forty hours per week shall be paid for at time and one-half with no pyramiding of overtime. Straight time earnings for day workers covered by this paragraph shall be the total daily normal shift earnings for eight hours divided by eight (8) hours.

(d) All mine workers, whether employed by the month, day, or tonnage, yardage, deadwork or footage rate, shall receive $3.05 per day in addition to that provided for in the contract which expired March 31, 1946.

* * * * * *

NATIONAL BITUMINOUS COAL WAGE AGREEMENT

Effective April 1, 1945

Executed in the City of Washington, D.C. April 11, 1945

* * * * * *

WITNESSETH:

1. (a) For all inside employes a work day of nine hours from portal to portal is established, including a staggered fifteen minutes for lunch, and without any intermission or suspension of operations throughout the day. Of these nine hours, seven hours shall be paid for at straight rate, the eighth hour shall be paid for at time and one-half, and the ninth hour shall be paid for at a flat rate of $1.50 ($1.00 at time and a half) for each inside day worker. Tonnage, yardage, deadwork or footage workers shall be paid full earnings predicated upon the basic tonnage, yardage, deadwork and footage rates that existed on March 31, 1943. As payment for travel and overtime beyond seven hours per day, there shall be added to the tonnage worker's earnings one-ninth of his daily earnings. On his sixth consecutive day of work in any week there shall be added to the tonnage worker's earnings for that day one-ninth of such earnings.

(b) For all outside employes (including all strip mine and coke-oven employes) a work day of eight hours and fifteen minutes is established, including a staggered fifteen minutes for lunch, and without any intermission or suspension of operations throughout the day. For these eight hours and fifteen minutes each outside employe shall be paid the same amount per day as he is now receiving and which is based upon seven hours of straight time and one hour and fifteen minutes at time and one-half. In addition thereto each outside employe shall receive $1.07 per day to equalize earnings of the outside employe with earnings of the inside employe.

(c) For outside employes whose normal work day heretofore has been eight hours, a work day of eight hours and thirty-five minutes is established, including a staggered fifteen minutes for lunch,

for which they shall receive the same pay they are now receiving plus a flat $1.07 per day to equalize earnings of the outside employes with earnings of the inside employes.

* * * * * *

UMW Ex. No. 1

APPALACHIAN JOINT WAGE AGREEMENT

Effective April 1, 1941, To March 31, 1943

Executed in the City of Washington, D.C.

June 19, 1941

* * * * * *

MAXIMUM HOURS AND WORKING TIME

Seven hours of labor shall constitute a day's work. The seven-hour day means seven hours' work in the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis; except in cases of accident which temporarily necessitates longer hours for those Mine Workers required on account thereof; and also excepting that number of Mine Workers in each mine whose daily work includes the handling of man-trips and those who are required to remain on duty while men are entering and leaving the mine.

OVERTIME: Work by Mine Workers paid by hour or day in excess of seven (7) hours in one day or thirty-five (35) hours in any one week, shall be paid for at the rate of time and one-half with the following exceptions:

* * * * * *

[Filed July 19, 1956]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Notice is hereby given that Ruth Elkhorn Coals, Inc. and all other Plaintiffs in the above-entitled case, excepting the Virginia Iron, Coal and Coke Co. of Roanoke, Virginia, hereby appeal to the Court of Appeals for the District of Columbia Circuit from the Order entered in this action on May 23, 1956, by Judge F. Dickinson Letts.

> "That defendant's motion for summary judgment be and hereby is granted, and the defendant's prevailing minimum wage determination for the bituminous coal industry issued October 26, 1955 is hereby declared to be in all respects valid."

LANDIS, COHEN, RUBIN AND SCHWARTZ

/S/ Wallace M. Cohen

Attorney for Appellants * * *

Dated July 19, 1956

[CERTIFICATE OF SERVICE]

[Filed September 14, 1956]

ORDER DISMISSING APPEAL WITH RESPECT TO PLAINTIFF STEARNS COAL AND LUMBER COMPANY

On motion of the Plaintiffs for an order dismissing the appeal herein of the Stearns Coal and Lumber Company, of McCrary County, Kentucky, and the defendant consenting thereto, it is on this 14th day of September 1956

ORDERED that the appeal of the Stearns Coal and Lumber Company to the United States Court of Appeals for the District of Columbia be and it hereby is dismissed

s/ Matthew F. McGuire

JUDGE

CONSENTED TO

Edward H. Hickey, Attorney for the Defendant

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

UNITED STATES DEPARTMENT OF LABOR
Wage and Hour and Public Contracts Divisions

MORNING SESSION
FEBRUARY 1, 1955
10:00 A. M.

PRESIDING OFFICER GRANT: As all of you no doubt know, this is a public hearing held pursuant to the provisions of the Act of Congress of June 30, 1936, known as the Walsh-Healey Public Contracts Act, and also pursuant to the Notice of Hearing signed by the Acting Secretary of Labor, Arthur Larson, on December 30, 1954.

* * * * * *

MR. DAWSON: Mr Examiner, I appear for twenty-two of the bituminous operators in Harlan County, Kentucky, each of which companies is a member of the Harlan County Coal Operators Association, and each of which is operating under a contract, union contract, with the United Mine Workers of America. I appear specially for the purpose of challenging the jurisdiction of the Secretary of Labor to hold any hearing for the purpose of fixing any minimum wage under the Walsh-Healey Public Contracts Act, and to the jurisdiction of the Secretary of Labor, after such hearings, to fix -- in accordance with his conception of the evidence introduced -- any such minimum wage applicable to the Bituminous Coal Industry, on the ground that Section 9 of the Act provides that the provisions of the law, each section and all of the sections, shall not have any application in respect to supplies and equipment or materials which usually may be purchased in the open market.

I am filing the protest in the form of a written protest in quadruplicate as the rules require, and attached is an affidavit of four gentlemen with reference to the question of fact as to whether coal is a commodity of supply or material which may be usually purchased in the open market.

I may say that this procedure is taken, as you doubtless understand,

so that there can be no question that if and when we desire to go to court on the question there will be no question but what we have exhausted our administrative limits. I think there is involved in this question and in this motion a question of law, namely, the construction of the meaning of Section 9; and two, the question of fact as to whether bituminous coal may be usually purchased in the open market. Now, I am not unaware of the fact that it has heretofore been ruled by your Department, Mr. Examiner, that the exception provided for in Section 9 is an exception that applies only in respect of those commodities and articles and supplies which the government agencies usually purchase in the open market. Our theory is that the exception applies to the availability of the material for purchase in the open market and not to their predilections or the restrictions of any purchaser who may want to go into that market, and for that reason I think it is important that in order that this record may be complete, as I understand the Secretary of Labor will pass on these questions, including the question of jurisdiction, that we place in the record not only these affidavits which are attached to the motion but that we also offer to you, Mr. Examiner, at as early date as possible, oral proof under oath as to whether or not bituminous coal may usually be purchased in the open market within the contemplation of Section 9 of the Act.

PRESIDING OFFICER GRANT: Mr. Dawson, may I ask you at this point: You referred to the fact that there were affidavits in support of this motion (indicating)?

MR. DAWSON: Yes, sir. There's affidavits attached to each of those motions.

PRESIDING OFFICER GRANT: Do those affidavits pertain to factual --

MR. DAWSON: They are directed to that fact alone, sir.

PRESIDING OFFICER GRANT: The oral testimony you are referring to --

MR. DAWSON: Would be along the same line. I just didn't know whether you would accept affidavits as evidence of the factual proposition

that we base our case on, namely, that bituminous coal may usually be purchased in the o en market.

I have here two witnesses from sales agencies, one in the South and one in the North, both of them with business pretty well all over the United States, east of the Rockies, who will testify in respect to that matter, unless it can be said that the affidavits will be accepted as the uncontroverted fact as to whether or not coal may be purchased, usually purchased in the open market.

PRESIDING OFFICER GRANT: That I am not prepared to say, Mr. Dawson.

MR. DAWSON: I didn't think you would be, so I would like to put these witnesses on.

* * * * * *

MR. FLANDERS: Mr. Examiner, the Government will object to any evidence given on the question of the application of the open market exemption.

MR. DAWSON: Then if that is right, this is all going in the record?

PRESIDING OFFICER GRANT: Your objection is based on disagreement with the legal interpretation?

7 MR. FLANDERS: We don't feel that that question is properly raised at this hearing. We feel it is irrelevant, has no connection with this hearing; it's beyond the scope of the inquiry as set forth in the Notice of Hearing. The Secretary of Labor's position respecting the open market exemption is set forth in the regulations published in the Code of Federal Regulations. The Administrative Procedures Act requires that before he can change those regulations a hearing for that purpose must be held, parties must be notified to be given an opportunity to be heard. That has not been done in this case. The Notice of Hearing in this case does not reach that scope.

* * * * * *

8 MR. COHEN: On behalf of 518 coal operators in the Virginia area, we wish to join in the position taken by Judge Dawson in opposition to this hearing and the validity of the hearing. * * *

MR. DAWSON: The affidavits are attached to the motions?

PRESIDING OFFICER GRANT They will be made a part of the record, Mr. Dawson.

MR. DAWSON: If anybody has the authority to do it -- if I could get a stipulation that irrespective of its application to the government agencies, that bituminous coal may usually be purchased in the open market, it would save the necessity of putting on all this, * * *

PRESIDING OFFICER GRANT: I think I could assume it, Mr. Dawson, for the purposes of your motion, because under the interpretation of the regulations of the Secretary it makes no difference whether it is an article that can be purchased on the open market. For the purposes of passing on your motion I can assume that as a fact.

* * * * * *

PRESIDING OFFICER GRANT: * * * I do feel I am obligated of course to observe the interpretations and the regulations of the Secretary of Labor on the subject of the motions that I am obligated, of course, to overrule those motions. * * *

* * * * * *

PRESIDING OFFICER GRANT: * * * I want to make it clear that I have accepted your motions with the affidavits attached for the record and that on the basis of the motions as so supported I am denying the motions and giving you an exception

* * * * * *

JOHN L. LEWIS

a witness appearing in behalf of the United Mine Workers of America, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

THE WITNESS: * * *

The areas set forth in the petition, carrying the various differentials effecting the minimum wages per hour, are set forth because they are the natural areas of the Bituminous Coal Industry and because they reflect the mature and considered judgment borne of experience of the men who have considered these problems in the industry for many years, and that is a lot, and who in their joint associations have found that these were the natural competitive areas existing at the present time Those areas change as conditions change, as populations shift, as enterprises

are built, as our economy expands, as prices fluctuate, as modern techniques are developed, those areas shift, but the area suggested for defining of localities of the Secretary's possible order represents the best judgment of men in the industry on the investment and management side and on the labor side. I doubt if there is any industry here in our country where the influences of competition are so delicately balanced and so ravaging and destructive in their effect when that balance is disturbed. There are the factors of competition. There are the local factors of competition. There is intense competition between the producers and the coal markets of the country in a given producing area, or in one of the
23 areas defined in this action. There is the competition between areas. Like the ebb and flow of the tides you might call it a competitive basin with the wash going this way or that way as indicated by convulsive conditions whether it be war or peace, economic depressions or full volume production, the development of new techniques, modern methods, increased productivity, new formulas in the industry. All of those things affect that competition.

* * * * * *

In a report which will be entered in the testimony here by my asso-
24 ciates, there were 5,368 operations in the United States during the year 1953 which were signatories to the National Bituminous Wage Agreement and which of course pay the wages and maintain the wage structure upon which this proposed minimum wage structure for the area is predicated. It might interest you to know in passing, Mr. Examiner, that 408 of those 5 368 operations represent 74.3 percent of the total amount produced under that contract in 1953. The rest of them, amounting to about 4,800 or 4,900, more or less, were able to produce 36,000,000 tons or 6 percent of that production. I suppose it is mines of this type that will largely be represented here in this hearing as the dissenters and the objectors to the promulgation of a minimum wage. When I hear someone say they represent 300 coal mines, I naturally know that they do not represent 300 coal mines in the modern sense, but they represent possibly 300 holes in the ground, manned by from one to two to ten to fifteen

men. A miserable wage is paid where no safety conditions exist, where the Federal Mining Code does not run, where ventilation does not exist, and where they live on corn meal and fat hog meat because they can't live any better than that under those conditions. So there will be those who wish to perpetuate that situation, but they are of insufficient consequence to affect the proper findings under this statute. The statute is compulsive upon the Secretary of Labor. The only questions at issue are the facts, unless per chance someone can file a legal action that will cause the Supreme Court to invalidate the Act in the years to come. The only questions at issue are the facts.

* * * * * *

26 The exhibits of the United Mine Workers will be later presented and identified. For the year 1953 it will show a tonnage of 377, 643, 840 tons produced by signatories to the standard wage agreement of the industry which are paying the wages indicated. Total tonnage for 1953 will be shown as 447, 487, 020 tons. The percent of the national production produced by signatories of the industry contract and by those who are not signatories who pay the same wages or in excess thereof is 84. 39 percent of the total national production, a compelling figure.

* * * * * *

27 CROSS EXAMINATION

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36 BY MR. DAWSON:

Q. I am not certain that I understand that the United Mine Workers as one of the petitioners here is recommending a minimum wage scale applicable to all these different areas that have different minimums now or do you recommend that different wage scales be fixed in each of the areas as set up in the petition? A. In these various areas, judge, there is a differential in the wage structure.

Q. That's right. A The Alabama wage structure is under Tennessee, and Tennessee is slightly under Kentucky.

Q. Geographically as well as in the wage scale?

(Laughter)

A. We have the Appalachian structure. As we go to the West, west of the Mississippi River, the differentials again are different. The Colorado wage structure is higher than the Appalachian wage structure. The Wyoming wage structure is higher than the Colorado, and the Montana wage structure is higher than Wyoming. So these minimums set forth here represent the concise judgment of the petitioners as to what are the figures which now in truth and fact exist in these several areas, and it has no relation to the question of any other wage scale, creation of any other wage scale, and does not in fact on any other problem of which I wot.

Q. If I understand, the recommendation is that the differential existing between these different areas will be kept in mind by the Secretary of Labor when he commences to determine what minimum wage

37 scale would apply to the respective areas? A. That is right, and those variations are expressed in the minimums suggested for the several areas.

* * * * * *

BY MR. AMOS:

Q. Mr. Lewis, may I ask you one question? Mr. Lewis, as a matter of fact, aren't these differentials in the various areas the result of years of negotiation with local boards or representatives of the prevailing group or predominant coal operators of that particular locality and over the many years that these wages proposed as minimums are the result of such negotiations reflected through this principle in those particular localities? A. Mr. Amos, I entirely agree with your suggestion. These differentials and these rates on every classification in the mining industry have been laboriously and painstakingly worked out, changed, modified, and brought down to the present state of perfection as a result of 54 years of joint, collective bargaining in the Bituminous Coal Industry. They represent the very quintessence of the judgment of the men who are responsible for these contracts, and they take into consideration every local condition, every change, variation of nature, the degree of skills that are involved, every factor of consideration are expressed in those

38 rates to which you have alluded.

* * * * * * *

39 W. A. BOYLE

a witness appearing in behalf of United Mine Workers of America, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOPKINS:

Q. Your name is W. A. Boyle? A. That is correct.

Q. State your official position with the United Mine Workers of America, Mr. Boyle. A. I'm employed as Assistant to the President of the United Mine Workers of America.

* * * * * * *

43 BY MR. HOPKINS:

Q. Mr. Boyle, please state whether or not, under the direction of the President of the United Mine Workers of America, you have caused to be prepared under your supervision a list of the companies and coal operations under union contract? A. I have, sir.

44 Q. Have you, under the same instructions and under your supervision and control, had prepared in that compilation the names of the various companies under contract to the Mine Workers? A. I have, sir.

Q. And, likewise, the location of the company operations? A. I have.

Q. And, likewise, the tonnage produced by each of the companies so included insofar as available, including the tonnage for 1953? A. Where available, I have, sir.

Q. And, likewise, have you included the number of employees in each of the several operations, so far as available? A. I have, sir, where available.

Q. And those total in number 5,368 operations; is that correct? A. That is correct.

Q. And it shows the total tonnage produced in the year 1953, so far as the figures are available, for those 5,368 operations? A. That is correct.

Q. And what percentage of coal, as shown by your compilation, what is the percentage of that coal so produced under contract to the

national tonnage produced in 1953? A The record will reveal that the exhibits total 84.39 per cent.

Q. What will the record disclose as to the total number, percentagewise, of the men employed in such 5,368 operations? A. The percentage number of the employees will show 84.28 per cent.

45 Q. I ask you to examine the volumes I now hand you, eight in number, and ask you if they are the volumes that you have caused to be prepared under your direction and supervision and control?

(Documents handed to the witness.)

A. They are, sir.

Q. They are divided as to Locality A, B, C, D, E, F, G, H, I, and J, in accordance with the Notice issued by the Secretary of Labor upon which this hearing is being held? A. That is correct.

Q. Locality A, for the sake of convenience and because of volume is included in four parts; is that correct? A That is correct.

Q. And the remainder are separated as may be shown by the tabs on each of the several documents? A That is correct.

Q. Mr. Boyle, in the compilation of the names, tonnage figures, and amounts that are reflected in these volumes, what source material, generally speaking, did you use in so compiling? A. Well, in addition to the information available to the United Mine Workers, the other sources utilized in the computation of the report were the various State authorities and the McGraw-Hill Publishing Company's directory, the Keystone Coal Buyer's Manual of 1954, and all publications of the Bureau of Mines which were available and pertinent to the report.

Q. Then I ask the question: Is the data contained in these several volumes, does it accurately reflect the data that you took from the official documents at your disposal? A. It does, sir.

46 Q. And these eight volumes now offered for identification accurately reflect, as to names of companies, locations, tonnage in 1953, the number of employees, accurately reflect the basic documents upon which you made your research; is that correct? A That is correct for all of those that the information was available

Q. To the best of your knowledge and belief the data herein contained is true and accurate in all of its several parts? A. It is, sir.

MR. HOPKINS: We offer for identification at this time, Mr. Examiner, United Mine Workers' Exhibit No. 8 * * *

* * * * * *

54 BY MR. HOPKINS:

Q. Mr. Boyle, turning to the exhibit that has been marked for identification, being the compilations referred to, I ask you to turn to the first page in Volume I, showing the table of tonnage by locality, and ask you whether or not --

MR. COHEN: Is that 8-A?

MR. HOPKINS: 8-A, yes.

BY MR. HOPKINS:

Q. (continuing) -- whether or not the figure of total tonnage produced by signatories, to wit, 377,643,840 tons, is that a correct compilation of the tonnage produced in 1953 by the companies enumerated in this exhibit under contract to the United Mine Workers of America? A. By the signatories to our contract, yes, sir.

Q. And the next column, total tonnage, 447,487,020 tons, is that an accurate figure of the total tons produced on a nation-wide basis in the year 1953? A. That is true.

Q. And the percentage produced by signatories, 84.397 per cent, is a correct percentage figure of the amount of tonnage produced in 1953 under union contract as set out in this exhibit? A. That is true.

Q. Is that likewise true, Mr. Boyle, of each of the tonnage figures shown in the first column under the heading "Tonnage Produced by Signatories" as it pertains to each of the localities from A through J?

55 A. That is correct

Q. And that is likewise correct as to the figures on tonnage under the column "Total Tonnage," as set opposite each of the localities from A to J under that column? A. That is also correct.

Q. And it is likewise true that the percentages under the column "Per Cent Produced by Signatories" is accurate and correct as it pertains

to each of the localities A through J? A That is correct.

Q And as to Locality A, it shows it to be 80 per cent? A. Yes, sir.

* * * * * *

59 Q. Mr. Boyle, of the 5,368 operations covered in Exhibit 8, you have included the tonnage figures for each individual operation wherever available? A That is correct. Now, in addition to that, Mr. Examiner, the exhibit will disclose that we have 1,217 operations that we were unable to arrive at any tonnage for those operations, and they are left blank in the exhibit.

In addition to that, we have 1,076 operations where we were unable from any source of information to arrive at the number of employees employed in those operations.

However, the exhibit now shows that there is 84.39 per cent of the tonnage produced in the year 1953 under contract with the United Mine Workers, and if we would take 1,217 operations under contract with the United Mine Workers of America for which the tonnage was not available for the year 1953, it goes without saying that that would naturally increase the percentage of tonnage above the 84.39, and the same is true as to the number of employees.

* * * * * *

60 Q. And the percentage of total employees for the 4,292 operations listed is 84.28 per cent? A That is correct.

Q. Then, in summary, as to Locality A, this exhibit will show all the operations by geographical location, name, tonnage, and men employed, according to the information available to you, and your exhibit accurately reflects that, is that correct? A. That is correct, in addition
61 to the location of the operation.

* * * * * *

79 JOHN OWENS,

a witness appearing in behalf of the United Mine Workers of America, after being first duly sworn, testified as follows:

BY MR. HOPKINS:

Q. Your name is John Owens, and you're Secretary-Treasurer of the International Union of the United Mine Workers of America, Mr. Owens? A. Yes, sir.

80 Q. Did you engage in the negotiation of each and all of the several agreements that have been introduced here as United Mine Workers Exhibits Nos. 1 to 7? A. Yes, sir.

Q. Mr. Owens, in the Notice of Hearing as issued by the Secretary of Labor you will find Area A reading as follows: "$2.245 per hour, in the area consisting of the States of Pennsylvania, Michigan, Ohio, Maryland, West Virginia, Virginia, Tennessee except the counties listed in Area D, Illinois, and Kentucky except the counties listed in Area C."

The Notice further states that the petitioners, of which the Mine Workers are one, contend that the minimum wages predominantly paid in that area, computed on a portal-to-portal basis, should be $2.245 per hour.

Will you please explain in your own way, based upon the contracts offered into this record, how that minimum hourly wage was arrived at? Just take your time and in your own way give such background of information as would be helpful to the Secretary and to this Examiner and to the Staff at this hearing A. The minimum hourly wage rates that prevail in all the geographical areas, that exist in our collective bargaining contract, come about because the employees in the mines producing coal in those geographical areas and the coal operators that own the mines of their own free will, under their own conclusions, decided in a collective bargaining contract that these rates enumerated in these 10 areas should be the minimum rates that the men who produce coal in their mines should receive as a standard wage, predicated on our standards, as they think they should prevail in those areas.

81 As a result of that judgment and those actions, there is in effect a collective bargaining contract that is the prevailing wage scale between the coal operators producing coal in those geographical areas and the men

who work in those mines, that carries with it a minimum wage scale in Area A of $2 245 per hour All but the State of Illinois were negotiated in what we call the Appalachian Territory. The only reason why we included the State of Illinois in Area A was because it carried the same minimum wage rate that prevails in Virginia, West Virginia, Kentucky, Tennessee, Ohio, and West Virginia.

Q. As well as Maryland is listed in that group? A. As well as Maryland.

Q. Certain portions of Kentucky and certain portions of Tennessee as enumerated is that correct, Mr. Owens? A. That's correct, sir. And Pennsylvania.

Q. Including Pennsylvania, likewise. A. These are the minimums. For the benefit of the record, we might state that approximately 85 per cent of all of the bituminous coal produced in America is produced by mechanical equipment; 15 percent of it, or approximately 71,000,000 tons is hand-loading coal, with 52,000,000 of it produced in mines that are 100 per cent hand-loading mines, and 19,000,000 of that 71,000,000 is produced in mines that have not yet gone 100 per cent mechanical on account of waiting on securing proper equipment or for other reasons best known to the operators that operate those mines. The other group are hand or mechanically or hand-loading onto conveyors which, according to the records, produce approximately 25,000,000 tons of coal The majority of that tonnage, or the employees that are loading coal on hand-loading conveyors that are under contract, receive $19 22 a day, which is considerably higher than the minimum rate In those hand-loading mines
82 where there is a tonnage rate for approximately 50 per cent of the men, that being the number required to operate a conventional hand-loading type mine, that you have to have 50 per cent day men and 50 per cent tonnage men to operate them efficiently, that 50 per cent of the men in those hand-loading mines are paid by the day and their rate is the minimum wage enumerated in these 10 geographical areas.

* * * * * *

84 We have the additional problem of determining the wages of the tonnage men. We contend that the tonnage men's hourly and daily wages are equivalent or more than the hourly and day wage rates enumerated in these 10 geographical minimum rates in these areas.

* * * * * *

85 So in order to determine how much these men earn, we have an historical fact that I'm going to refer to that was compiled under subject to penalty by law during the year that it was compiled, from the coal operators' own books, including union and non-union. In addition to these rates that were enumerated in 1941, we have a one-ninth added to those rates and their yardage earnings and deadwork earnings, plus an accumulated amount of $8.25 that became effective in the first blanket rate of $1.85 in 1946, which the rates now provide, the tonnage rates enumerated in this 1941 contract, one-ninth and $8.25.

* * * * * *

114 W. A. BOYLE

having been previously sworn, resumed the stand and testified further as follows:

* * * * * *

CROSS EXAMINATION * * *

* * * * * *

124 THE WITNESS: Maybe I can help you clarify this thing up a little bit.

BY MR. COHEN:

Q. Mr. Boyle, if you can I would be most grateful to you.

A. All right. I believe that you will go along with me and accept the U.S. Bureau of Mines figures in this instance, that 19,119,050 tons of coal were produced in the State of Virginia during the year of 1953. We can show that 13,998,050 tons of that was produced under this union contract which is a percentage of 73.215.

* * * * * *

183 JOHN OWENS.

having been previously sworn, resumed the stand and testified further as follows.

CROSS EXAMINATION (Further)

* * * * * *

205 THE WITNESS: I have no knowledge of how many coal companies that signed the contract worked last week or week before last or are still producing coal I do know they haven't terminated their agreement with the United Mine Workers in conformance with the terms of the agreement or the terms of the law as provided for under the Taft-Hartley law, that you have to give 60 days notice in order to terminate the agreement, and they haven't done that So they must be under contract, either working or contemplating working next month or next year, or whenever the business or the market is available for them to operate their mines.

* * * * * *

207 THE WITNESS: As far as we know, all of the coal operators listed there that haven't terminated the agreement in accordance with its terms and the law, are still signatory to the agreement. I wouldn't suggest that there would be a coal operator in America that would terminate his agreement without giving us the proper notice under the law.

* * * * * *

BY MR. FLANDERS * * *

235 Q. Mr. Owens, you stated when you first came on the stand that these tonnage rates are designed to return at least the minimum hourly rates set forth in your petition; am I correct? A. That's right.

* * * * * *

Q Excuse me, Mr Owens. What I asked was whether these rates that you have given me were designed to return the minimum hourly wage that you have suggested for the area in which those various States are located? A. That's right, sir The negotiators of this joint wage contract, through arguments produced by industry in joint conference, in fact, in 1945 I think it was we had a distinguished Senator present figures and pictures of men in a pamphlet showing how much they earned

as tonnage workers compared to what the basic rate was at that time, and the history of these wage negotiations have been one of trying to relate the tonnage rates so that the tonnage earner would earn as much as the day-wage-rate provided for in the contracts, and I pointed out to you that the fact submitted by the operators, being that 50 percent of those men are in a convenitional hand-loading mine, day men, and 50 percent on a tonnage basis, * * *

* * * * * *

237 BY MR. FLANDERS:

Q. Mr Owens, the minimum wage that you request the Secretary to find as prevailing in these various areas are the hourly rates as set forth in the petition? A That's right--in here (indicating)? Yes.

Q. Now, what is your request as to tonnage, specifically, tonnage workers? A. Well, we say that the prevailing wages paid to the tonnage men in those areas is to be preserved, that --

Q. You state also -- A. -- that equals or exceeds the minimum wages.

Q. In other words, if a man is paid those tonnage rates, he will receive the minimum specified in those hourly rates? A That is right.

* * * * * *

240 Q. Would there ever be any operator within any district of the UMW that paid for any reason less than what the contract calls for? A If he did he would be in violation of the agreement.

Q You know of no such case? A No, sir

* * * * * *

242 BY MR COHEN:

Q. Mr Owens, this morning counsel for the Government referred to U.M.W Exhibit 1. Schedule A, page 7, and asked you whether or not there were any district agreements relating to the tonnage rates established in that contract and, as I recall, you stated that there were but you didn't have them with you Do you happen to have the district agreement for Virginia? A You're in error about what I said.

Q. Will you correct me, sir? A. I said that the only available contract that we could use for the purpose of honestly stating the wage rates was the exhibit of 1941 plus the various contracts that have been negotiated since that--national agreements--carrying with them the increases from the 1941 contract Any other publication since 1941 has not been negotiated by any source that has been authorized by the mines affiliated with the United Mine Workers

Q. Did I understand you to say there have been no district agreements negotiated since 1941? A. Since 1941.

243 Q But you did have a district agreement in effect in 1941 which was carried forward by this U M W Exhibit 1; isn't that correct? A. This controls it Anything that conflicts with the national agreement is not in effect The wage rates stipulated in the 1941 agreement are the controlling wage rates

* * * * * *

244 THE WITNESS "This Agreement (subject to the amendments, modifications and supplements as hereinafter provided) carries forward and preserves the terms and conditions of the Appalachian Joint Wage Agreement (dated June 19, 1941) effective April 1, 1941, to March 31, 1943," which is the 1941 agreement

BY MR COHEN

Q Yes Well, the 1941 agreement was carried forward, together with all district agreements was it not, sir? A. Subject to the terms and conditions of this agreement

Q I'm not questioning that, sir I'm just asking you if that isn't true There are district agreements in effect subject to this agreement? A. Well, they were in effect in 1941

Q. And they're in effect today, are they not? A Only as it applies to this 1941 agreement

Q The language of the contract that you now have with the signatory mines in the Virginia area carries with it any district agreement that's outstanding, does it not? A There is none outstanding, sir This contract of 1941 supersedes all existing wage contracts and this

stipulated wage contract affects every district enumerated in the contract, and those rates are the rates.

245 Q. All right, sir. A. Any rate that conflicts with it is not in existence.

Q. If it doesn't conflict, it is in existence; isn't that right? A. Well, it's not in existence because this is the controlling one. This is the one they used.

* * * * * *

246 BY MR. COHEN:

Q. Well, will you accept what appears to be stated in this document, which was introduced in evidence by the Government, on page 121, that the average tons per man per day in Virginia was 7.04? Will you accept that? A. Well, it all depends upon--You mean as a whole?

Q. Yes, as an average. A. If the figure is right for the production, we have no objection; whatever it is.

Q. Yes. And on the very next page, page 123, will you accept the national average as 8.17 as contained there? A. That's right, sir.

Q. Is that correct, sir? Is that the way it appears in that exhibit? A. Yes.

Q. Now, on page 72 of the same exhibit you will notice that Virginia, for mines without loading devices--that's hand-loading--has an average of 5.94. A. That's right, sir.

Q. All right, sir. Now, with respect to Virginia, according to U.M.W. Exhibit 1, there is a rate here, tonnage rate on machine loading of .758; is that correct? Approximately 76 cents. A. Virginia, .758 loading and .107 for cutting coal.

* * * * * *

249 A. -- of 86.5 per ton, cutting and loading coal.

Q. Where do you see 86.5? A. 75.8 and 10.7, cutting and loading.

Q You mean you're adding those two figures together? A In order to get the tonnage men They're paid by the ton, both of them

* * * * * *

250 Q All right Multiply it by 5 94, sir A But, that's for all of the men in the mine and we say that there are 50 per cent of them paid by the day, which makes the average production per man employed in that mine, not 5 94 tons, but double it which is 11 88 tons per man employed in the hand-loading mines in Virginia on the record

Q. You mean that the average production of a hand-loader in a Virginia mine is 11 tons a day? A At the face

Q. Average? A. Average for the men engaged in loading coal in the mines in Virginia on the record

Q. Will you tell me how you arrived at that figure?

* * * * * *

251 A. * * *

In a conventional hand-loading mine, for your information, it was stated repeatedly in all of the conferences that south of the Ohio River, that they had more than 50 per cent of the men that were paid by the day in tonnage or conventional rate mines that were loaded by hand, but for the benefit of arriving at an average rate we just took 50 per cent . So if the record shows that in a hand-loading mine, that the average production in a 100 per cent hand-loading mine is 5 94, they have to load twice that much in order to get 5 94 for the average of all of the men employed in that mine

* * * * * *

252 A. Because you don't understand it--I want it clear for the record that the Virginia production in hand-loading mines, from your own records, shows that the men produce 5 94 tons, and we say that in every mine where the men produce coal at a hand-loading rate, that there is one man paid by the day and that that means that there is twice the production of the men at the face in order to arrive at that average

Q. But there is one man loading coal, is there not? There is one man who is loading, is there not? A. Yes, but he produced 11.88 tons.

* * * * * *

260 Q. The Southern Appalachian Wage Agreement is not in effect? A. The rates that you referred to, or the classifications that you referred to, trappers, the minimum rate on the inside is $17.96 a day. That's the minimum rate. Those classifications were deleted in succeeding contracts to 1941.

* * * * * *

PRESIDING OFFICER GRANT: What does that mean, Mr. Owens? It means, of course, they're no longer covered by the contract?

THE WITNESS: No longer covered by the contract.

PRESIDING OFFICER GRANT: Does it mean that the United Mine Workers' proposal should not be applicable to those employees?

THE WITNESS: Oh, they now receive this minimum rate that I'm telling you.

PRESIDING OFFICER GRANT: That wasn't clear to me.

THE WITNESS: They now recei[illegible]nstead of those rates that was in the contract in 1941, they now receive the minimum inside day wage rate or the minimum outside day wage rate.

261 PRESIDING OFFICER GRANT: Well, is that minimum inside or minimum outside day rate less than the rate that is being proposed here?

THE WITNESS: It is the proposed rate.

PRESIDING OFFICER GRANT: It is the proposed rate?

THE WITNESS: Yes, sir.

BY MR. COHEN:

Q Now, you referred to paragraph 7 of the 1945 agreement, and that says:

"Slate pickers shall receive the basic outside rate per day and per hour."

Isn't that right? A. That's right.

Q Well, I asked you about trappers and switch-throwers A All the inside men, those men who are on the inside receive, all men employed in the mine shall receive not less than this $17 96

Q. Where does that appear, sir? A Well, we'll try to find that for you, sir.

Q. Before you go on with that, sir, there was just one other question I wanted to ask, and that is: Suppose you have a very deep hole in the ground a hand-loader who shovels coal into the cars has to walk some 2, 248 feet underground before he arrives at his point of operation, or he travels by way of a car, and he loads this average tonnage that you referred to Won't he load a different tonnage from the man who only has to go 200 or 300 feet into the mine and start his loading? A That's right,

Q So that what you're talking about is really averages? A. Based upon--

262 Q You're talking about averages So that it may be that there will be men who are receiving less than $2 245 an hour and there may be men who are receiving more than $2 245? A Not on the records.

Q. Not on the records? A No We negotiate those rates so that they will earn--

Q. $2 245 an hour? A Try to

Q So that even though--Well those rates as you negotiate them are such that they predict the absolute capacity of every man doing any handloading? A Well, there's no yardstick

Q. You mean it may very well be based upon--A That can't be absolute in all those conditions, but it is a known fact--

Q. It's generally true-- A -- that they do earn it

Q It's generally true?, A Yes

Q But there are men who earn less than other men? A That's right, sir

* * * * * *

265 PRESIDING OFFICER GRANT I think that you're in effect asking, Mr Cohen, is whether or not that $2 245 is an average rate

or an actual rate.

MR. COHEN: That's right.

PRESIDING OFFICER GRANT: Is that what it amounts to?

MR. COHEN: Exactly.

THE WITNESS: It's an average rate.

BY MR. COHEN:

Q. It's an average rate; not an actual rate? A. As it applies to the tonnage men.

Q. So that what you are asking for in your petition, now, as a basic minimum, is the average rate?

PRESIDING OFFICER GRANT: For which employees? For all employees?

MR. COHEN: For all employees, or for the hand-loaders.

THE WITNESS: No guaranteed rate for the tonnage men.

BY MR. COHEN:

Q. Well, let's go on to other matters. Have you found the information that I asked you for? Did you find the information as to whether or not those rates that I referred to have been deleted from the contract? A. They were deleted from the contract under an order, Executive Order, issued under the National Labor Relations Board.

* * * * * *

266 Q. * * *

Would you mind telling me again--I didn't quite understand you. The National Labor Relations Board ordered you to delete these--

A. No, they issued an order that we could negotiate the deleting of those rates and put them under the minimum inside able-bodied rate and the minimum outside able-bodied rate.

Q. What proceeding was this? As I understand it, Mr. Owens, the United Mine Workers is not qualified to appear before the National Labor Relations Board.

MR. LEVY: Do you mean the War Labor Board?

THE WITNESS: The War Labor Board, sir. I'm sorry.

BY MR COHEN:

Q. Let's get the record straight, then. Under the War Labor Board you received some kind of a ruling and on the basis of that ruling you negotiated the deletion; is that correct? A. We did delete it.

Q. You didn't negotiate it; you just deleted it? A. With the consent of the negotiators in the conference.

Q. With the consent of what negotiators in what conference and when? A. The joint conference, I think it was 1945.

Q. And that was when it was deleted? A. That's right.

Q. And it has been deleted and is no longer an effective rate, even today? A. No longer an effective rate.

Q. Would you explain to me, then, how it becomes a part of the wage rates set forth in the wage agreement between the Southern
267 Appalachian Coal Operators Association and District 19, United Mine Workers of America, effective March 6, 1950, as amended and effective October 1, 1952 and in which the classification of greasers, trappers, flaggers, and switch-throwers is placed at $2 per hour? A. Well, it's a violation of the contract, and it was printed--I don't know whether it was printed by the coal operators in southern Tennessee or in southern Kentucky or in eastern Kentucky, but it's not applicable under the terms of the contract. Anybody that's paying that rate to those classifications is in violation of the agreement and we know nothing at all about it.

Q. But if this is the rate that's being paid, it is the prevailing rate in those areas, is it not? A. No, it's not the prevailing rate.

Q. For these particular occupations? A. No.

Q. A minimum rate of $2.245 would raise the rate from $2 to $2.245, would it not? A. Not under the terms of the agreement.

Q. Do you distinguish in the agreement between what are the actual rates being paid to employees in the mining industry? A. We don't so admit that they're being paid that.

Q. You don't admit that there could be any difference between what is set forth in your agreement and what the actual wages are that

the men are receiving? A. That's right. Unless some coal operator is violating the terms of his contract.

* * * * * *

268 BY MR. COHEN:

Q. I understand, sir, and I gather that insofar as your presentation here is concerned as petitioner, your position is that the prevailing rate is that contained in the U. M. W. contract; not the rate that is actually being paid? That is your contention, sir? A. Repeat that, -- You can make whatever statement you want. You don't have to repeat it.

Q. No; I'm asking you that question, sir. You are a petitioner here, your're making the contention, and I've asked you whether or not you are contending here for the rate which is the U. M. W. rate as a prevailing minimum rate in the industry, regardless of what the men are being paid? A. We say it is the prevailing rate. We don't say that--

* * * * * *

269 MR. COHEN: * * *

Now, I asked him about district agreements and I intend to prove that there is a Virginia district agreement to a somewhat lower rate than the rate as set forth in the basic agreement. With respect to those district agreements, we find in one, the wage agreement between the Southern Appalachian Coal Operators and District 19, that rates are set forth which are lower than the minimum which has been asked for here.

Mr. Owens has responded that, if they are paid, they're unlawful; that what he is contending for is the U. M. W. rate. So I've asked him whether or not, in presenting his petition, he is presenting a petition for the establishment of a basic minimum wage based upon the U. M. W. agreement, or whether it is based upon the wages actually paid in the industry, and I think it's perfectly proper for him to answer that question because it goes to the heart of this petition.

MR. HOPKINS: He has answered the same thing several times in several different ways under your questioning

MR. COHEN: I submit, sir, that there has been no answer to that
270 question.

THE WITNESS: I'll answer you now, so you'll understand it, that I say that these are the prevailing rates and that the contract that you quote from is a printed copy that may have been published down there without the authority of the United Mine Workers or the operators who signed the agreement.

BY MR. COHEN:

Q. May I ask: Are you generally requested for the authority to publish these district agreements? A. For your benefit, there is coal operators that will publish contracts and they don't counsel with anybody whether it's accurate or whether it's not accurate, but if a grievance arises under the terms of that contract, why, that grievance is adjudicated in accordance and conformity with the agreement predicated upon the master agreement that's now in effect.

Q. I see. A. So if some operator, signatory to this agreement, at your request swears that he's in violation of the contract, why, that's his privilege here. But I'm telling you, counsellor, that the terms of the contract--and I hope you take it for granted--that those rates enumerated in that contract are not the prevailing rates as we understand them, and if it is in existence, we know nothing at all about it and I can't testify to its truth or to its existence.

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277 BY MR. SADUR:

Q. * * * can you tell me the name of any operator within one of the 14 counties that I mentioned the other day--and which I would be glad to name again--that is paying a minimum rate of $2.245 per hour? I particularly refer to the operators in central Pennsylvania. A. I'll say this, that every coal operator signatory to the contract in Location A, which includes Pennsylvania and all the other States enumerated in it, we say that that's the prevailing rate.

* * * * * *

280 PRESIDING OFFICER GRANT: Well, let me ask Mr. Owens.

Mr. Owens, is there any substantial change in the constituent members or signatories to your agreement from one year to another?

THE WITNESS: Not substantially at all.

PRESIDING OFFICER GRANT: Can you give us any general estimate, perhaps, as to what variation there may be in numbers of signatories to your agreement from year to year?

THE WITNESS: No, I can't, sir.

MR. COHEN: Mr. Examiner, I would like to suggest that perhaps the witness ought to indicate what he means by substantial change in signatories, because frequently there are people who go out of business and cease to do business and don't change themselves as signatories.

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THE WITNESS: Well, may I for the record say to counsel that we believe, and rightfully so, that the percentage is higher because of the fact that we have negotiated a contract with west Kentucky, and that the casualty list of the mines that have been abandoned or closed down hasbeen those small operations that employ a very small number of men, and if there is any increase, percentage-wise, it would be an increase in the tonnage that is under contract with us.

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285 GEORGE A. LAMB,

a witness appearing in behalf of Pittsburgh Consolidation Coal Company, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR AMOS:

Q You may proceed, Mr Lamb A My name is George A. Lamb I'm manager of business surveys for the Pittsburgh Consolidation Coal Company. My office address is the Koppers Building, Pittsburgh, Pennsylvania

* * * * * *

287 All of the tonnage produced by Pittsburgh Consolidation is mined in Area A under a wage contract with the United Mine Workers The

inside day rate of $17.96, or $2.245 per hour, is observed as the minimum wage.

* * * * * *

291 * * * the Government, as the largest buyer, can seriously disturb the prevailing wage structure of the bituminous industry unless there is a minimum wage standard applicable to the coal it purchases. In bidding for business, a slight difference in the mine price may determine whether one company or another will get the sale. Companies with U. M. W. workers are equalized as to wages, and whether one can quote lower than another depends upon conditions such as lower operating costs or the decision to take lower profits. Wage costs are a sizeable part of total operating costs. In the case of Pittsburgh Consolidation, the wage costs are about half of the total operating costs.

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395 HUGH R. HAWTHORNE

a witness appearing in behalf of the Pocahontas Fuel Company, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

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396 THE WITNESS: This is a statement of the Pocahontas Fuel Company Incorporated respecting the proposed determination of prevailing minimum wages for the Bituminous Coal Industry.

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399 Realistically and in actuality the wage agreement with United Mine Workers establishes by its express terms the rates of pay which "prevail" in the bituminous coal industry within the meaning of the Walsh-Healey act. This, we believe, will be conclusively established by evidence introduced into the record of the hearing in this proceeding showing the extent of the application to employees in our industry of the UMWA rates of pay, it has been established. For it is well recognized in our industry that the vast preponderance of mine workers either belong to the United Mine Workers Union and are paid wage rates established by its Contracts or receive wages equal to or higher than such contracts. Hence, it is clear as a matter of fact that the minimum rates of pay established by the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, are the prevailing minimum wage rates in our industry.

* * * * * *

401 * * * As with other categories of employees within the scope of the UMW agreement the prevailing minimum rate for pieceworkers should be the existing rates paid pursuant to such agreement. Such minimum should apply whether the pieceworker belongs to UMW, another union, or no union

As to pieceworkers, however; it should be understood that their piece rates are subject to some variation. Thus, while the daily rate portion of their compensation ($8 25 per day regardless of the amount

of work performed) remains constant, the piece rate (sometimes denominated tonnage rate plus one-ninth, dead work and yardage) is subject to

402 variation within different coal producing Districts of the industry. The nature and extent of such variations, however, is in all cases determined and fixed by the terms of collective bargaining agreements with the United Mine Workers governing the wage rate of such workers in the several coal producing Districts.

* * * * * * *

404 By the terms of our union contract as currently applicable, the minimum wage paid to our workers within its scope is $17.96 per workday of eight hours from portal to portal. This includes a 30-minute paid lunch period. This minimum daily rate is equivalent to an hourly rate of pay of $2.245.[2]

Under the National Bituminous Coal Wage Agreement, the minimum hourly rate of $2.245 prevails as to all mine workers in nine specific and one general work classifications.

* * * * * * *

405 Pocahontas bituminous coal production is mostly within "District 7" (one of the 23 coal mine producing districts established under the Bituminous Conservation Act of 1935, the so-called "Guffey Act"). By reason of our familiarity with coal production conditions in our District we believe that virtually 100% of the coal mines in District 7 operate under and in accordance with the National Bituminous Coal Wage Agreement.

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CROSS EXAMINATION

BY MR. WEISS

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413 Q. Could I turn to one other thing, Mr. Hawthorne. You mentioned on the case of the tonnage workers that your suggestion to the Secretary is that the provisions in the UMW contract relating to tonnage workers be found to be the prevailing minimums for tonnage workers; am I correct on that? A. Yes, sir.

Q. Does the UMW provisions relating to tonnage workers apply throughout the country or is it limited to the Appalachian area? A. It's my understanding that they apply throughout the country.

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2 Although the historical evolution of these contract wage rates through the compounding effect of successive wage agreements through the years is somewhat complex, it is believed that for the purposes of this proceeding that history can be put aside. For it is our present wage rates currently being paid which are of significance in this proceeding.

Q And am I correct in understanding that there is no guaranteed rate equivalent to the day rate for these tonnage workers in the agreement and in the actual operating practice of your company? A. That is correct as to their total day compensation. They are in the present contract guaranteed this $8.25.

Q. That's the minimum, and they get tonnage earnings above that, but there is no guarantee above that level? A. No.

Q. What is your information regarding the proportion, roughly speaking, of tonnage workers who actually do earn more than the minimum day rate for slack work Do you have any information on that? A. My information on that is very limited. My own company has now only a few tonnage workers, relatively. We have 125 or thirty, something like that, whereas in the past we perhaps had one or 2,000, but we are actively in the process of changing from hand-loading to machine-loading, and we've almost completed it I have observed in our company, in a general way, the earnings of the miners over the
414 years, and I feel I am correct in saying as far as our company is concerned our average miners' earnings has been quite high as compared with the day men's earnings and well above the minimum of the day rate.

Q. That is as a general average? A. A general average; yes. That's what I am speaking about.

* * * * * *

437 THE WITNESS. I have in mind myself that there would be perhaps many different factors In the coal business, for example, the competition between coal companies and coal fields, different areas, are not in the sense here but in that sense is an important governing factor in the determination of many things here we have to deal with such as freight rates, and I should think that that would be one factor that might well be considered, not only in the Secretary's determination here but in the determination of the fact that we do find there is a common wage structure for these different territories that are set up There are freight rate relationships, marketing relationships that come about

through the location of various consuming industries, consuming outlets, and I would judge that those things would be significant in considering whether or not these proposed areas were appropriate areas.

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448 PRESIDING OFFICER GRANT: Gentlemen, yesterday--I think it was just before we recessed for lunch--we had rather extensive arguments off the record in regard to the need for continuing the hearing. Since that time I have been besieged with requests from individuals, and I fully appreciate their position. I think perhaps it's about time for me to clarify the atmosphere a little bit.

Here is the conclusion that I have reached.

It's quite apparent to me that there are a number here who have not had an opportunity to prepare themselves for the hearing. I can appreciate their position and, in consideration of the fact that they're not prepared and that the Secretary of Labor is certainly interested in receiving all possible pertinent information that might be available, we're going to suspend the hearing at the close of today and resume again on Monday, February 14, at 10:00 o'clock.

Now, I want to put you all on notice that, when we resume on the 14th, we will continue in session until the hearing is completed, without further adjournments and without further continuances.

* * * * * *

449 MR. COHEN: Sometime during the coming week, I think, Mr. Examiner, we would probably be able to put together a list, insofar as we're concerned, a list of the witnesses who will appear and the approximate time that they will take on direct examination, and maybe that would facilitate some sort of schedule which would not require everybody to hang around during the entire proceeding.

* * * * * *

466 Q Do you contend that the minimum wage, the minimum prevailing wage that's being paid in the County of Anderson in Tennessee is the wage contended for under this petition? A. Well, I'm not familiar with it when you refer to what's paid there currently, but we contend

that the prevailing minimum wage that the Secretary should find for Anderson County is the one requested in this petition.

Q. In other words, it's your contention that the Secretary should find as the minimum wage the one contained in this petition, regardless of whether or not is is actually the current prevailing minimum wage in the area? A. It's our contention that Anderson County is a part of Area A, and that the minimum wage should be established for Area A.

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488 J. O. ARCHER,

a witness appearing in behalf of Blue Diamond Coal Company, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

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500 PRESIDING OFFICER GRANT: I take it, then, that there are occasions when these pieceworkers do not receive the minimum hourly rate?

THE WITNESS: You mean the minimum hourly rate as being asked for here?

PRESIDING OFFICER GRANT: Yes, sir.

THE WITNESS: Yes, sir, that's right, in many cases.

PRESIDING OFFICER GRANT: You say there are many cases?

THE WITNESS: There are many cases where they don't make that minimum, and there are other cases where they make substantially more than that. It depends on how hard a man wants to work. It depends on how thick the coal is It depends on many things that enter into a coal-loader's day's work

To give you an example, we have one hand-loading mine where the basic rate, as published in this contract, is 75.2. Well, the first thing that the loader is relieved of is the drilling of the coal, and the

501 agreed rate for drilling the coal for him is 8 cents 4 mills. That leaves 66 8 And then the company furnishes the powder, makes

the dummies, hauls the explosive into the mine, and shoots down the coal for him, and for that an agreed allowance of 5 cents is made. That brings his loading rate down to 61 8. And that's what he actually receives for each ton of coal and, of course, added onto that is the one-ninth for travel time that's contained in the 1945 agreement and the $8 25 that is in the 1952 agreement, which has been built up starting with 1946 until it's now $8 25. But that's the way his final earnings are arrived at, is so much a ton for loading, plus one-ninth for what we call the travel time, plus $8 25, which is a flat amount to all workers inside the mine So no two miners ever make the same in that sense There will be some fluctuation all the time on how much they load Maybe they won't clean up every day.

So I don't see how anything better could be applied to the piece-worker than to apply the agreement that we now have, so far as those of us are concerned who have an agreement covering it.

PRESIDING OFFICER GRANT. Do you think it's feasible at all to fix a minimum wage rate for them, Mr. Archer?

THE WITNESS No, sir, I don't.

PRESIDING OFFICER GRANT I mean in any amount.

THE WITNESS Any minimum.

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536 S P HUTCHINSON

a witness appearing behalf of the General Coal Company, after being first duly sworn, testified as follows

DIRECT EXAMINATION

BY MR AMOS

Q Will you state your full name and the position that you hold with the company? A My name is S P. Hutchinson I am presently Executive Vice-President of the General Coal Company of Philadelphia.

Q Are you familiar with the mines in a general way in the State of Virginia? A. I am

Q Does your company operate a mine in Virginia? A The General Coal Company is the exclusive sales agent for the Stonega Coke and Coal Company

* * * * * *

547 Q. * * * Do you deny that there has been a substantial change in the means and methods of producing coal in the various areas with which you are familiar as comparing this 20-year period? Now, what is your answer to that question? A Yes, there has been a change.

Q. What has that change consisted of, Mr. Witness? A. Improved methods of mining, lower costs of mining, more mechanization. I can't think of anything else to answer that question.

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649 PRESTON H. HASKELL,

a witness appearing in behalf Alabama commercial coal operators, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

THE WITNESS: My name is Preston H. Haskell, of Birmingham, Alabama. I am principal owner and operator of a relatively small coal mine in Jefferson County, Alabama, and am appearing on behalf of the Alabama commercial coal operators I appear in support of the petition of the proponents.

* * * * * *

650 THE WITNESS. I am merely stating that the Alabama commercial operators are in favor of the establishment of the minimum wage.

Over 90 per cent, according to the best information we have, of the Alabama coal production is produced under contract with the United Mine Workers. * * *

* * * * * *

CROSS EXAMINATION

654 BY MR. SUSSHOLZ

657 Q * * * You said that about 90 per cent of contract mines in the State of Alabama, is that correct, meaning mines which have contracts with the United Mine Workers--is that your testimony, sir? A Yes, sir.

Q. Now, when you say in about 90 per cent of the mines, tonnage-wise, what figure does that represent? In other words, what percentage of the gross tonnage from the best available figures you have is produced by the so-called contract mines? A I think it would follow the number of mines; at least 90 per cent tonnage-wise, is produced by mines under contract with the United Mine Workers of America

Q Now, of that 90 percent of total production, what percentage is at the actual United Mine Workers contract minimum? A. I have no

knowledge of that I presume if they have a contract, then they're paying the contract wages.

Q. Well, sir, isn't it a fact that to your knowledge there are some mines in Alabama which are under contract to the U. M. W. or with the U. M. W. which nevertheless are not paying the contract minimum wages?

MR. COMBS: Mr Examiner, the witness answered that and said he didn't know, that he assumed if they were under contract they were paying the wages, and I see no use in going on and on in order to put that in the record

PRESIDING OFFICER GRANT: I think it's proper cross examination, Mr. Combs.

658 A. I repeat, I have no knowledge of the relationship of other operator with the United Mine Workers. It is not for me to delve into and I've never done so

* * * * * *

Q. How did you acquire your knowledge that approximately 90 per cent of the Alabama mines are under contract with the U. M. W. ?

A. From several sources The statement--Let me back up a minute.

First, it's well known that all of the large mines are and have been for years under contract with the United Mine Workers, and they represent some, according to these figures, 75 per cent of the tonnage in Alabama. I've served on negoitating committees in the past and have participated in the negotiation of these contracts. So, of the remaining 25 per cent it is rather common knowledge the few who are not under contract with the United Mine Workers. They're small outlying mines which as I said at the outset, I estimated was around 10 per cent of the production They're on the fringes of the producing area down there, which is some 150 or 200 miles in extent.

Q. Now, sir, you say it's well known that most of the large mines in Alabama are under contract with the U. M. W.; right? A. Yes.

Q. Now, is it also a fact that's relatively well known that many of these very same mines under contract with the U. M. W. are not

659 paying the minimum wage called for in the contract?

MR. AMOS: I object to that. We've gone over that once, and why rehash it?

THE WITNESS: I've already said I had no firsthand knowledge of any not paying the wage. Of course, you can hear rumors and reports on anything, but that isn't knowledge.

* * * * * *

661 PRESIDING OFFICER GRANT: * * * Can you answer the question, Mr. Haskell? Have you any knowledge, direct or indirect, that the mines having agreements with the United Mine Workers in

662 Alabama are not paying the minimum wage provided in the contract?

THE WITNESS: I have heard reports where small truck mines having long hauls to the railroad are not paying the full United Mine Workers scale, but whether that is true, or not, I do not know, and whether they actually have contracts, or not, I do not know. You would have to check both to answer your question definitely, because some of those may fall in the 10 per cent or whatever the exact figure is that don't even have contracts. And, obviously, if somebody told me that Jones over here was not paying the scale, then I would not go over and say, "Do you have a contract, Mr. Jones, or are you just operating non-union?"

In other words, I have no means for differentiating between those small mines, of which there are some 100 or more, whether they have contracts, or not, and all we could do is estimate that about 10 per cent had no contracts

BY MR SUSSHOLZ

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Q * * *

Do you deny that there has come to your knowledge that some mine owners under contract with the U M W are not paying the minimum wage called for in the contract? Would you answer that Yes or No, sir? Do you deny that? A Would you care to define come to my

knowledge a little more?

663 Q. Well, I'm trying to avoid criticism directed at me by other counsel here and I'm trying to abbreviate the thing. Surely you know what I mean by the term "come to your knowledge." I'm not asking you yet in what form it came to your knowledge. I'm merely asking you: Have you heard--Do you deny that you have heard that some of the contract mines in your area are actually not paying the minimum wage called for in the contract?

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664 THE WITNESS If you mean that it has come to my knowledge in incontrovertible form where I could accept it as being absolutely true, I would say No.

BY MR. SUSSHOLZ

Q. Mr. Witness, I'm trying to abbreviate this thing. Suppose you tell us if you have heard it in controvertible form. A. No.

Q. You say you haven't heard in incontrovertible form; is that correct? Now, I'm asking you have you heard it in any form whatsoever? A. I've heard rumors and reports to that effect.

Q. That some of the contract mines are not paying the minimum wage? A. Yes.

Q. Has there been any indication--How often have you heard that? A. I do not know. That's an impossible question to answer. I made no record of the times and have no knowledge of how many times I've heard that.

Q. And from whom have you heard that? A. As I outline previously, in general operators' meetings someone might mention it or in talking to some other sales agent who had lost an order, he would say, "Surely they can't be paying the wages." You hear things like that in any period of depressed conditions in the coal industry, and many of those small operations are run by families. There may be a father and two sons and a couple of nephews and you'll hear reports that they sell the coal and divide the proceeds, and all kinds of things. But I've never run around trying to check up on those things. It's

665 not my business what they do

Q. And have you been hearing that over a course of years, sir? A. Over the past three or four, I would say, since the coal business became so depressed in Alabama and the unemployment so widespread. People will do a lot of things if their compensation has run out and they're hard up for a job

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BY MR. FLANDERS:

687 Q. Mr. Haskell, would it be your opinion that, generally speaking, tonnage workers earn--that is, under the U. M. W. tonnage rates--earn an average hourly rate at least equal to or in excess of the minimum requested in the petition for your area? A. Your question was do the men paid on a tonnage basis earn about the same as the minimum hourly rate?

Q. Yes. A The tonnage rates were set with that objective in mind, that they could earn at least that much, or more, and during the years when lots of coal was mined under tonnage rates and I was familiar with that, they did. Now most of the mines are at least partially mechanized and largely hourly rates are being paid, and I'm not currently conversant with that situation

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700 WILLIAM C. SOUTHERN

a witness appearing in behalf of the Virginia Coal Operators, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GREEAR

Q Please state your name and age. A. William C Southern, Jr., Clintwood, Virginia, age 35

Q. What is your occupation? A Attorney at law.

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704 THE WITNESS In those sections of the Virginia coal field where the coal lands are owned by small companies and individuals, the recovery of coal by small truck mines has continued to flourish

As the economy settled back to a peacetime basis, competition has become very keen and coal has experienced great trouble in holding its own against other sources of energy and competing fuels. This has meant repeated reductions in price. There were coal operators who were operating under contract with the United Mine Workers of America who found themselves pinched between lower realization for their coal on the one side and the high cost of operating under the United Mine Workers contract on the other. * * *

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705 THE WITNESS In order to stay in business at all, those mines operating under the Union contract have found it necessary to use every method for the reduction of cost. This has resulted in very heavy investments by the mining companies in machinery and consequent reduction in the number of employees required to maintain their normal output. The employees thus displaced by machines have become, in many instances, a great burden on the community. For instance, in that portion of the Virginia coalfields covered by the Virginia Coal Operators Association, there were employed in February, 1952, 8041 Union coal miners. On January 15, 1955, this number had been reduced to 2,450. * * *

In Virginia these miners who have been replaced by machines in the mines operated under the Union contract have turned to small truck operations or small rail connected mines not under the Union

706 contract. In a majority of instances, the present non-Union operator is a former Union coal miner. The result has been a large increase in the number of truck mines in Virginia with consequent increase in their production and men employed. This is the factor which has supported the economy of Southwest Virginia and has kept it from becoming as critical as that of other coal producing areas.

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709 THE WAGES PROVIDED IN THE UMW CONTRACT ARE NOT PAID TO EMPLOYEES OF ALL SIGNATORY COMPANIES

As one Union organized coal company after another has closed its mine and sold its equipment, other operators began looking for ways and means of escape. One of the devices in common use in Virginia and Eastern Kentucky is what is called "gang work". Under this system, the operator refuses to pay his employees any guaranteed wages whatsoever. He agrees to pay them so much per ton for each ton of coal which they deliver to his tipple and the operation of their section of the mine is entirely in their hands. The proceeds on a ton basis are divided among the men equally or as the men direct on each payday period with Union dues being deducted by the operator from the per ton price. As a result of this method of operation, large numbers of coal companies operating under United Mine Worker Contracts are actually paying, and members of the Union in good standing are actually receiving far less than the minimum wage which the petitioners are requesting under the Walsh-Healey Act. Other operators, in order to break even, have curtailed their own operations cutting off their men, and then buying coal produced by the small mines operating without the Union contract, which coal is dumped into the larger companies' tipple along with the coal produced under the Union contract on all of

710 which the operator pays the Union the welfare fund of 40¢ per ton. This is generally referred to as "welfare coal". Although the information is hard to obtain, the most reliable information available at present shows that in Virginia there are today only two or three coal companies signatory to the Union contract which are not engaged in one or the other of these devices to some extent. We know that the same thing exists in parts of Eastern Kentucky. We do not know to what extent it permeates the entire industry but believe that these practices or others similar to them are being universally engaged in

714 * * * In the wage scale provided under the United Mine Workers contract there is a provision for compulsory payment of "travel time" or "portal to portal" pay and this is a part of the $17.96 per day which the petitioners allege to be the prevailing minimum wage. There has not been and there is not now any custom or practice to pay portal to portal pay in the bituminous coal industry. Portal to portal pay is paid only to employees under the Union contract and no coal company operating out from under the Union contract pays it. To fix the wage prayed for in the petition would be in direct violation of Title 29, Section 254, of the United States Code as it would force employers to pay this traveling time although they had no contract to do so and there is no custom for such payment. The $2.245 hourly wage prayed for in the petition includes travel time which cannot be inflicted upon coal companies not signatory to the Union contract.

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719 The petitioners may claim that production of coal under Union contracts and under the requested minimum wage actually exceeds the non-Union production of coal. A true and accurate picture of the actual tonnage properly placeable in each category would be relatively impossible to paint. Vast and untold amounts of non-Union truck coal, gang work coal and so-called welfare coal combined to swell the tonnage reported by the so-called Union mines. The basic question at any rate is not one of efficiency, volume of production or relative output of any group of mines. The question is simply this -- What is the prevailing minimum wage?

The prevailing minimum wage is the wage which is being paid currently to the greatest number of employees engaged in the production of coal. In the Virginia field 8,234 men are currently employed at a prevailing minimum wage of $1.25 per hour, and a maximum of 5,000 union men are possibly receiving a minimum wage of $2.245 per hour.

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742 BY MR. GREEAR:

Q. Now, did you make a survey with reference to the wages paid the men working in the production of coal in Virginia? A. Yes, sir.

Q. How did you obtain that information? A. From personal contact, by myself, by Montie Meeks of Norton, Virginia, three of us working in Lee, Wise, Dickenson, Scott Counties. The information

743 from Buchanan, Russell, Tazewell was furnished by Mr. Pobst and Mr. Shufflebarger respectively.

Q. Have you made a calculation on the figures furnished you? Strike that. Did you receive the wages paid from each one of the companies listed in your exhibit? A. No, sir; we did not. The number that we received I believe was 406, was all the information we got that on.

Q. You got the wages paid from 406 of the companies? A. That is not all on the list.

Q. Are the 406 companies listed here? A. Yes, sir.

Q. Have you made a calculation as to the prevailing minimum wage paid by those 406 companies? A. I have, and what my definition of what the prevailing minimum wage is.

Q. What is your definition of the prevailing minimum wage? A. It's the lowest wage paid to the greater majority of all the employees shown on this list, the minimum wage paid to the most people of all the employees on the list filed.

Q. And what was that wage? A. $1.25 per hour.

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746 BY MR. GREEAR:

Q. Does your figure of $1.25 cover all of the Virginia coal fields? A. It covers all that we have information on, which is approximately 406.

Q. Are those covered in every county, those 406 from every county in the Virginia coal fields? A. With the exception of one county. It does not have any coal--I beg your pardon, two; from Montgomery or Pulaski, to my knowledge.

Q. I believe the production of coal in Pulaski and Montgomery is very negligible; isn't it? A To my knowledge I can't say I've heard
747 that it was, but I do not know personally.

Q. But I mean of the counties that we are referring to here? A. Yes. In other words, Buchanan, Dickenson, Wise, Lee.

Q. Those 406 that you have wage scales on, are those representative of all the counties about which we are inquiring? A. Yes, they are very representative with the exception of Lee County.

Q. What is the situation in Lee County with reference to wages paid? A I personally talked to between 18 and 22 operators in Lee County that I know personally and have for some time, and they described to me the procedure by which they operate, but they likewise demanded that I not use their names.

Q. What is the procedure by which they operate in Lee County? A By what is called gang-work

Q. What is gang-work? A. Well, an individual--one individual would tell another individual, "I will give you $2 a ton or some figure to put coal in a tipple for me." That person would take his family or his children or any one he might care to get to go with him, and they would go under the ground and put coal in the tipple at so much per ton. At the end of the week or at the end of the payday, whenever it was, the man getting the coal paid them so much per ton for putting it in the tipple.

MR AMOS I want to object to that and move to strike it out as the witness has said he is not permitted to tell who gave him that information as to this gang-work

THE WITNESS Every one I talked to in Lee County gave me that
748 information with the exception of two operators

MR AMOS I understood you to say you were not permitted to divulge their names?

THE WITNESS The ones who are working gang-work.

MR AMOS So I object to any testimony relative to gang-work unless he expects to be cross examined on it

PRESIDING OFFICER GRANT: Mr. Amos, I don't know whether that affects too much the reliability of the testimony of this witness as to whether or not he divulges the names of these people. He says that is the information that was given to him by all but two operators in the county. I am going to let his testimony stand.

BY MR. GREEAR:

Q. Is this practice used to any extent in the Virginia coal fields? A. I think it is primarily the practice in Lee County from what observations I made and the contacts I made.

Q. Are those operators there signatories to the United Mine Workers contract? A. They said they were.

749 Q. Did they pay union dues on this coal produced? A. They said they did.

Q. And did they pay the welfare royalty? A. I talked to one man who said he was paying it. The others said--two men told me they had never filed a report, and the others said they usually paid a token of approximately a nickel a ton.

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756 CROSS EXAMINATION

BY MR. FLANDERS * * *

761 Q. Mr. Southern, when gathering the information concerning the number of men employed by the various mines, did you attempt to get a yearly average? A. No, sir. I did not. I attempted to get the men that were employed on the last day of the year, that is, of '54.

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763 Q. Has it been your experience that tonnage workers generally would receive more than these workers who are paid an hourly wage? A. The question was general, and I will answer you, yes.

Q. You have listed certain union coal companies and have given a figure as to their employment. A. What page is that on, sir?

Q. I believe it's on page 16 of your statement. A. Now will you ask the question?

Q. Is that a complete listing of all union-operated mines in the State of Virginia? A. No, sir; I do not think it is, but we were at a considerable difficulty in attempting to secure any information from such operators. The figures typed in are the only figures that I per-

764 sonally have knowledge of

Q. You obtained these figures through direct contact with officials of these mines? A. No, sir. The figures typed in were obtained from the Virginia Coal Operators Association The figures in pencil were gathered by Mr Pobst and Mr. Shufflebarger, and as I said before, this does not include the figures the gentleman testified to yesterday morning as to the coal that he purported to be mined in Virginia but actually where the opening was in West Virginia.

Q. Did the report of the Virginia Coal Operators Association from which these figures were taken list employment as of a certain date in 1955? A The report for '55 is indicated as being in January of '55 whereas some of the other years were in different months.

Q. But it does not purport to give an average for the year? A That is not the way I interpreted it by any means

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766 PRESIDING OFFICER GRANT Do you have any information, Mr. Southern, as to whether or not those piecerates or production rates equal or exceed the $1 25 an hour that you found for most of the hourly rate workers?

THE WITNESS I would say sir that they exceeded, speaking in the majority of cases Without any exception I think you could say that all shooters and cutting men would without any exception.

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769 BY MR AMOS

Q Would you give us for the record the name of each of the 75 companies that you personally contacted? A I will do my best, sir

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776 THE WITNESS: Your next company is on page 3, and they are both by the same trade name, Bridge Coal Company.

BY MR. AMOS

Q. What is the address? A Mr. Amos, in response to the conversation back and forth, I would like to say that if I said I contacted them personally I qualified that if you remember. In other words, in many instances these records are presently and have been in my office for some time. Now, I qualified my answer to that statement.

Q. How many did you say you had in your office for some time? A. I would say approximately fifteen. That is, approximately.

Q. Is it fifteen, or is it ten, or is it twenty? A. I am unable to give you an exact count, sir

Q. You don't know what you have in your office? A. I said, approximately fifteen. On this page you pick up Bridge Coal Company. The coal is being mined in Buchanan County. The office is in Dickenson County, and the records are maintained in Dickenson County.

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784 BY MR. COMBS:

Q. Is it Wise County? A. Yes, sir.

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793 BY MR. AMOS:

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A. Let's go to Hibbitts Branch Coal Company, the fourth from the bottom.

Q. Hibbitts Branch? A. That is correct, sir.

Q Where is it? A. That is in Dickenson County, R. F. D. Clintwood. I would like to qualify that. That is the address of the operating partners. I think the mine is located in Wise County.

Q. Are you sure whether it is Wise or Dickenson so we can check it? A. I said, sir, the operating partners were located in Clintwood, Virginia and the operation was in Wise County.

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813 BY MR COMBS:

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814 Q. That's all right. Now, I ask you then why is it you are limiting your survey of the union operated mines to the northern Virginia Coal Operators Association? A We are not limiting it to that, sir. We were attempting to take our information from the best available source, and it is my opinion and my contention that the survey made by the Virginia Coal Operators Association is the latest and most authentic information that we could gather. For me to walk in to the Stonega Company at Big Stone Gap and ask how many union men do you have working at their six or eight different localities would be in my opinion, of little value.

Q Are all of the union mines in that section covered by the Virginia Coal Operators Association agreement? A. I would have to speak again and say that in my opinion all of the signatories to the contract, that have what we refer to as a full contract, are members. If there are others, I am not saying that there are not others.

Q. Well, now, what are you saying then? A I am saying again that I am relying on this survey for the counties involved so far as the union employees. It was very difficult, Mr. Combs, for a person working in our position to secure information from a union mine.

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825 BY MR COMBS:

Q. All right, Mr Southern. You are speaking of gang work in common use in Virginia and Eastern Kentucky. Now, before we go into any question on what gang work is, would you tell me a specific instance in Eastern Kentucky that you know about regarding gang work? A. I know specifically. In other words, I keep payroll records on union mines in Kentucky which have been and are presently maintained in my office, companies that have a United Mine Workers contract.

Q. Would you name that company? A I refrain from answering that question.

Q. You would refrain from it? A. Yes, sir; I would.

Q. It is rather difficult for us to test your evidence here a little bit if we don't know who you are talking about. A. I know very well who I am talking about, sir.

Q. I said, if I don't know. If you won't tell me, how am I going to know?

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826 PRESIDING OFFICER GRANT: Mr. Southern, is this more than one company in Eastern Kentucky that you keep the books for that resorts to the so-called practice of gang labor?

827 THE WITNESS: Yes, sir.

PRESIDING OFFICER GRANT: How many are there?

THE WITNESS: I only have two in my office.

PRESIDING OFFICER GRANT: Both are located in Eastern Kentucky?

THE WITNESS: Yes, sir.

PRESIDING OFFICER GRANT: How do you arrive at the conclusion that they do employ gang workers?

THE WITNESS: I have seen their payrolls. The payrolls are kept in my office. I do not keep the payrolls. In other words, I have seen it in the office.

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828 PRESIDING OFFICER GRANT: Are you prepared to state that those payroll books conclusively show that gang labor was employed by these two companies?

THE WITNESS: If my definition of gang work, which I haven't been able to give, is correct, I would answer your question as, yes.

PRESIDING OFFICER GRANT: Let's have your definition as to gang work.

THE WITNESS: My definition of gang work is this: If you own a piece of coal, you lease that coal to me, you tell me that you will pay me $2 a ton or some figure to produce that coal and put it in a tipple. I in return pick up six or eight men to help me, and I'll tell those men, I'll say, "I'll give you $1.50 to put that coal in the tipple." At the end of

the payday the employer, the middleman, divides the number of tons produced, gives it to the men No hours is kept on the number of hours that these men worked that are called gang workers. If they make $300 with three men working, they split it three ways. It is based on tonnage.

829 In other words, sir, you might quite frequently have three men working on a gang. You take the number of tons that they mine, multiply it by a figure which they are being paid per ton and divide that by the number of men working in the gang and pay each one of them the same.

PRESIDING OFFICER GRANT: Now, these two companies, do they operate exclusively on that basis or do they employ workers directly to whom they pay the wage rates covered by the United Mine Workers agreement?

THE WITNESS: In the two mines that I am speaking of specifically, I would say that approximately 50 percent are on gang work. However, there are only four employees on the payroll that I would say would receive not only the union wage but much in excess of it.

PRESIDING OFFICER GRANT: Now, for social security, tax purposes, those gang employees are considered to be employees of the mine operator?

THE WITNESS: Yes, sir; they are. Social Security is deducted; union dues are deducted, and it is as such. They are treated in the payroll, taxes, and social security the same as an hourly man.

PRESIDING OFFICER GRANT. What again could you estimate--would you say that practice represents about 50 percent of the people or the operations of the two operators?

THE WITNESS: 50 percent of the employees of the two operators.

PRESIDING OFFICER GRANT: In each case, 50 percent?

THE WITNESS: Yes, sir I would say that would be a fair estimate. In other words, they are not exclusive gang work men, the two that I referred to.

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831 PRESIDING OFFICER GRANT. Are you saying that the amount

of compensation that those employees receive is less than the rate provided for in the agreement of the United Mine Workers applicable to the particular district?

THE WITNESS: I would have to be advised as to what the union contract calls for in this section of Kentucky. If it is anything over $1.50 an hour I would say they are paying less. I do not know what the union contract in Kentucky calls for.

PRESIDING OFFICER GRANT: In other words, you think the average rate of pay of these employees, the average hourly rate is approximately $1.50, or not more than $1.50?

THE WITNESS: I would say not more than $1.50. However, in Lee County I would say, yes, that I saw one payroll where gang men were
832 making as high as $30 a day each.

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MR. COHEN: Mr. Examiner, I would like to renew my request at this time. Let the Department of Labor take depositions in the Virginia area for purposes of establishing whether or not the union wage is being paid by signatories to the United Mine Workers contract, particularly with reference to the work called gang work, and also with reference to that coal which is mined by non-union mines and sold
833 through the signatories of the UMW agreement with the signatories reporting the tonnage on their own and paying the welfare fund 40 cents a ton.

PRESIDING OFFICER GRANT: I am not at all convinced that that is necessary, Mr. Cohen, that depositions need be taken on that more or less restricted aspect of the case.

When you say that this practice, is I suppose, a common practice--that was the term you used--do you have reference to the mines which had contracts with the United Mine Workers in Virginia?

THE WITNESS: Yes, sir.

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PRESIDING OFFICER GRANT: Is there any reason why you can't give us the identity of the mines, of the operators with whom you talked?

THE WITNESS: I feel like that would be leading a lamb to the slaughter. I feel that the information is available first-hand, and I gained the information from personal friends of mine. When the in-
834 formation was given to me it was given to me in trust and not to be revealed.

PRESIDING OFFICER GRANT: I am not going to require you to disclose it, Mr. Southern, but I will tell you this that if you don't disclose it perhaps no weight will be given to your testimony in that respect.

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840 BY MR. KOPP:

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Q. Well, speak of the small, non-union mines. Do you know the number of them that own the property on which they operate? A. I do not, sir.

Q. Do you know the number of them who lease the property on which they operate? A. No survey was made with that in mind. However, I do know of several of my personal knowledge that do lease coal fields.

Q. Do you have any knowledge of the size of the leased acreage? A. Well, there's two that I am familiar with called the Holly Creek Coal Company and E.M G. Coal Company. I believe their leases would cover--I believe there's one for 65 acres and one for thirty.

Q. There's a number of leases much smaller than that, is there not? A. Definitely so, sir.

Q. Do you know of any larger leases? A. Of my personal knowledge I do not

841 Q. These are all comparatively small lease holding spots that are being operated so far as you know? A. The majority of them I would say are.

Q. Necessarily the life of each of these mines is relatively short; is it not? A. I would say, yes, so far as any one particular opening is concerned.

Q. Then just as soon as that mine is exhausted then the operator, if he is in Virginia, must find another lease some place; is that correct?

A. I presume that would be true with any coal operator.

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858 REDIRECT EXAMINATION

BY MR. COHEN:

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860 Q. There has been some confusion here about the area covered by your computations. Perhaps we can clarify it. I think you stated that all but two counties are covered by your non-union computations, two counties in Virginia; is that correct? A. There was no data, to my knowledge, secured from Pulaski County or Montgomery County.

Q. But with respect to all the other counties engaged in coal production, that is, where coal production is engaged in, your figures purport to cover 70 percent of the mines producing there; isn't that correct? A. Yes, sir, of the total produced.

Q. And those are 70 percent of the total non-union mines producing there? A. That is my estimate.

Q. Now, with respect to the union figures which you have, I understood you to say that you have obtained those from the Virginia Coal Operators Association and from the testimony of Mr. Hawthorne? A. Yes, sir, and information from Mr. Pobst and Mr. Shufflebarger.

Q. And that information from the coal operators association does not cover the entire Virginia area; does it? A. No, sir; it does not.

Q. What area does it cover? A. It covers Lee County field, the Wise County field only, as of January, 1955.

BY MR. FLANDERS:

Q. Only two counties that were covered, you say? A. That have union men that belong to the association. In other words, Scott County, we got a report out of Scott County, I believe, on about 20-some-odd-mines. We missed about four or five. They are all small producers,

861 and most of their coal is sold to truck trade. Therefore that would be another county, but there are no union mines, to my knowledge, in Scott County.

BY MR. COHEN:

Q. And what about Dickenson County and Russell County and Lee County? A. The Clinchfield Coal Corporation is in Dickenson, and it is included in this.

Q. It is included. So that Dickenson and Wise -- A. I beg your pardon. I omitted Dickenson County through error.

Q. Dickenson and Wise and Lee Counties are included in the Virginia Coal Operators Association coverage? A. Yes, sir.

Q. That is insofar as union producers are concerned? A. Yes, sir.

Q. The other principal producing counties are Buchanan and Tazewell; isn't that correct? A. Yes, sir.

Q. And those are in District 7; are they not? A. Yes, sir.

Q. And they are not covered at all by the Virginia Coal Operators Association? A. No, sir. They are in another association.

Q. So that your information on the District 7 production and wages and employment was obtained from Mr. Pobst and Mr. Shufflebarger? A. That is correct.

Q. And also from the information, from the testimony of Mr. Hawthorne? A. Yes, sir. However, the testimony from Mr. Hawthorne, I think we already had that figured exact before the testimony.

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864 RECROSS EXAMINATION

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867 BY MR. FLANDERS:

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873 Q. Mr. Southern, the United Mine Workers, in its Exhibit 8, lists approximately 90 companies operating union in the State of Virginia, or 90 mines which are union operated in the State of Virginia. Is it your contention that, as of 1954, only the mines you have listed in your statement, the 17 companies, were still operating? A. No, sir. In other words, far be it from the truth.

* * * THE WITNESS: I said far be it from the truth. I think

there are more than I have listed that do have a union contract.

* * * Q. This does not purport, then, to be anything like a total, a complete total of all the union operated mines? A. It purports to

874 show the number of union employees that have a contract and are paying the full scale, from the best available information that we can accumulate.

Q. But you do not intend to infer from this that there are no other union mines being operated where the union contract wage is being paid? A. No, sir, I do not.

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884 H. CLAUDE POBST,

a witness appearing in behalf of the Virginia Coal Operators, after being first duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. COHEN:

Q. What is your name? A. H. Claude Pobst.

Q. And where do you live, Mr. Pobst? A. I live in Grundy, Buchanan County, Virginia. I have lived there 36 years last month. Born in the adjoining county of Tazewell, Virginia. Seventy years old and I'm a lawyer.

Q. Are you familiar with coal operations in your county? A. Yes.

Q. Do you have a statement that you wish to make here at this time? A. I do. May it please the Examiner, I speak wholly for Buchanan County, Virginia, the county of my adoption for 36 years, and for the little man of the county, the truck miner.

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891 THE WITNESS: * * * There are now possibly 400 of these small truck mines operating in the county. Further, for the most part, the minerals these small mines operate on are owned by local citizens. They're not of the quality and they were not sufficiently desirable to attract outside capital to come in and buy them, because large investors from the outside will not invest in small and isolated patches of coal. These small areas, underlaid with coal of a minable thickness but too

small an acreage to draw a spur track of a railroad to them, thus turned to the trucks for transportation to the railroad, and it was found to be feasible.

Another reason for the truck mines became apparent. The county was underlaid, as I have stated, with thin seams of coal, low in quality and in small boundaries that would not attract large investors. This was an ideal chance for the small operator, the coal miner who had been laid off his job in the larger mines, the small investor, and the little man who wanted to provide jobs for his sons, brothers, and friends. Therefore, I should say in the large majority of cases the money made from these small truck mines stays in the county. The owners are in the county, their workers are in the county, and mostly the land is owned by the citizens of the county.

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898 THE WITNESS: I can tell you about what the truck mines get for the coal, yes. Yes, I can say something of that.

MR. LEVY: Would you do that?

THE WITNESS: Yes

MR. LEVY: Thank you very much.

THE WITNESS: Now, another thing, Mr. Examiner, with which we are confronted is that these small truck mines, for the most part, have got to sell their coal on an industrial market or steam market, and that means crushed coal. They usually crush it. Now, the high volatile coal, with a harder structure which is acceptable for domestic uses and will pass the smoke ordinances of the cities, is in prepared sizes. Our coal that I'm speaking of, this high volatile, soft structure, coal is not good for the domestic market because, in the first place, it doesn't pass the smoke ordinances and, in the next place, if you try to prepare these sizes, it has too little percentage of the lumps and larger pieces. So that we are forced in competition with--what do you call the leavings?

MR. LEVY: Fines.

THE WITNESS: That screen through, that is, from these harder structure coals, that screen through.

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934 CROSS EXAMINATION

BY MR. FLANDERS:

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936 Q. You estimated, I believe, that there was some 400 truck mines operating in Buchanan County? A. Something like that.

Q. Was that estimate intended to reflect the situation as of 1955? A. Yes, sir.

Q. About how many truck mines would you estimate were operating on January 1st, 1954? A. Well, I don't know that I could estimate it, but I would say there was a great number, a great increase.

Q. So that during the year of 1953--now, this is during the year--you would say there was probably around 400 truck mines operating? A. Possibly not. There's been a gradual increase.

Q. Would you give an estimate as to the average tonnage of these truck mines? A. Do you mean each mine?

937 Q. Yes. A. No, sir. That would be--do you mean per mine?

Q. Yes.

PRESIDING OFFICER GRANT: The average tonnage.

THE WITNESS: No, sir; that would be impossible. Some of them are somewhat smaller or larger than the others. I just couldn't say except to take the 400 and divide it into four million, whatever that would be.

BY MR. FLANDERS:

Q. Would you say that most of them produced as much as 1,000 tons a year? A. 1,000 tons a year?

Q. Yes, sir. A. Yes, sir; I would say more than that. That would only be five tons a day, and a truck mine couldn't survive on that production.

Q. In the year 1953 there would have been close to 400 truck mines producing as much as 1,000 tons? A. Or more.

Q. Or more? A. I would say that is approximate. There's some less than 400, to my estimation.

Q. Mr. Pobst, the Bureau of Mines in its publication in the Mineral Industry Surveys for the year 1953 lists 293 active mines in the entire State of Virginia. A. 293 active mines?

Q. In the year 1953; 293 mines with more than 1,000 tons. Would you be able to explain the difference with your estimate of close to 400 producing nearly 1,000 tons and the figures put out by the Bureau of Mines? A. No, sir; I cannot. That is surprising to me. I think we
938 had that many and certainly more in the county. I don't know but it's entirely possible--as I say, suppose I had two or 300 acres of land. I may lease it out to ten or 15 people. It all accumulates together. They may call that one mine.

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979 T. G. SHUFFLEBARGER

a witness appearing on behalf of the Virginia Coal Operators, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. COHEN:

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993 Q. Do you know whether or not there are any union mines that obtain less than the contract union wage? A. I have no first-hand knowledge of that, Mr. Cohen. I know something generally about the group or gang work.

Q. You mean you have gang work in Tazewell County too? A. I understand that there is. In what mines, I don't know.

Q. Is there a practice in Tazewell County of non-union mines selling their coal to union operators? A. That is the general reputation.

MR. COMBS. Mr. Examiner, I think we have been awfully patient
994 about the general knowledge, general this, general practice and all. I just don't think we can be expected to accept all that stuff. He states there is a general practice of truck operators selling non-union coal

in Tazewell County to union operators. Now, what on earth are we going to evaluate out of that? General practice, that is all he knows, what mine --

PRESIDING OFFICER GRANT: Mr. Shufflebarger, do you have any personal knowledge of any particular transaction of that kind?

THE WITNESS: I have no personal knowledge, sir.

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995 MR. COHEN: * * * I do want to call attention to my previous request to the Examiner, that is, that there are certain types of information which are extremely relevant to this proceeding which are not easily obtainable by other than through government representatives, and I again appeal to the Examiner of the Department to either take depositions or send someone into that area to ascertain the true facts about the prevailing wage in that area. And I submit that if there are non-union mines that are selling their coal to union mines, and non-union wages are being paid to those workers in the non-union mines, and the union mines are paying royalties to the welfare fund, that it has a direct bearing upon what the prevailing wage is in this area.

996 I think that you will find that as has been testified here that it is not only common practice in this area but in certain other areas.

MR. COMBS: Now, Mr. Examiner, I think that one attorney just switched off and another one is testifying to something that is not competent or relevant.

MR. AMOS: If we are going into general knowledge, why don't we bring a lot of mine workers up here and let them tell you that they had talked to somebody and failed to disclose who it is, but they had a talk with somebody at a union meeting, and they heard somebody say that the non-union mines were paying more than the minimum scale in the mine workers contract. Would you let that go in?

PRESIDING OFFICER GRANT. I am in agreement with you, Mr. Amos. I am not in disagreement.

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1003 T. G. SHUFFLEBARGER,

having been previously sworn, resumed the stand and testified further as follows:

CROSS EXAMINATION (Further)

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1012 BY MR. SUSSHOLZ:

Q. Now, in making your investigation of prevailing conditions in your area, did you hear that any signatories are actually violating their collective bargaining agreements?

MR. COMBS: The same objection.

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PRESIDING OFFICER GRANT: * * *

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1016 We have had some testimony from the gentleman from Alabama, it's true, which I do not believe is sufficeint basis for a finding. I suppose you could ask this witness if it's a fact of common knowiedge in Tazewell County whether or not these contracts are being observed, but I certainly think you ought not to stop there, that you ought to inquire into the basis of that knowledge so that the evidence can be properly weighed.

I'm just giving you the benefit of the doubt on this, Mr. Sussholz I don't want to be guilty of committing error here or excluding testimony that the Secretary himself might later on say should have been admitted so that he might consider it, --

MR. COHEN: I just want to comment, Mr. Examiner, --

PRESIDING OFFICER GRANT: -- and necessitating, perhaps, the reopening of the hearing at considerable expense and inconvenience.

MR. COHEN: I just want to comment, Mr. Examiner, that no one snould be placed in the position of putting a clothespin on the nose of the Secretary of Labor if there's a strong smell emanating from some part of the industry. He might very well want to investigate that smell and find out whether there's something rotten there. I think that the

most that we could hope to do here, where we cannot prove it in concrete terms, is to call attention to the bad odor and the Secretary may very well want to make an independent investigation.

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1017 BY MR. SUSSHOLZ:

Q. In making your investigation of prevailing conditions in Tazewell

1018 County, have you heard that any signatories to these U. M. W. collective bargaining agreements are actually violating those agreements?

MR. AMOS: I want to object to that. I just want to file an objection.

PRESIDING OFFICER GRANT: All right.

Can you answer the question?

THE WITNESS: I have heard that union signatories are not always paying the contract price, through this method: sub-leasing or contracting the mining of coal to individuals who operate as a truck mine and deliver the coal to the signatory's tipple where it is processed and shipped, and that that coal is being--the labor mining that coal is being paid less than the contract price, but that the 40-cent a ton royalty is being paid thereon and the union dues of the employees of these truck mines are being checked off the payroll and paid to the union.

BY MR. SUSSHOLZ:

Q. Does the term "gang work" apply to what you've termed a sub-lease arrangement, or is that something different? A. Well, I think it's something different.

Q. Is gang work resorted to in Tazewell County, to your knowledge? A. I hear that it is. That's my information.

Q. Can you give us, sir, some idea of how often you have heard these reports and over what period of time?

MR. AMOS: That's objected to.

PRESIDING OFFICER GRANT: I think we ought to know the extent of the reports, according to his knowledge.

A. I would say that I have heard that over a period of at least 12 or possibly 15 months

1019 BY MR. SUSSHOLZ:

Q. And when you say you've heard it over that period of time, without disclosing your source, can you tell us if you've heard it from more than one source? A. Oh, yes, numerous sources.

Q. And by numerous, can you give us any approximation of how many numbers of sources you've heard that information from? A. That would be impossible, Mr. Sussholz. It would be a matter that would come up in conversation. Maybe you'd hear it once a week or maybe you'd hear it once a month. Specifically, I don't recall--I don't know--right now I couldn't recall any specific person who told me that, but that is general talk in the community and has been for 12 or 15 months.

Q. You cannot give us any approximation of the number of persons you've heard it from, in terms of any figure you would think to be a range in terms of persons who've indicated that to you? A. Oh, that would just merely be a guess.

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1020 Q. Can you give us any approximation of the persons from whom--just in terms of your own approximation--

MR. OWENS: May we have a continuing objection, Mr. Examiner, to all of this?

PRESIDING OFFICER GRANT: Yes.

THE WITNESS: Oh, it might be limited to 25; it might be 100 different people. I just couldn't say.

BY MR. SUSSHOLZ:

Q. Would you say, therefore, that it was common knowledge? A. Yes.

Q. Now, may I ask you this, sir: Are you a member of the Bar of Tazewell County? A. Yes, sir.

Q. Are you also engaged in legal work elsewhere in Virginia? A. To some extent

Q. Now, this common knowledge with respect to alleged violations by signatories, is that confined to Tazewell County, from your observations and what you've heard? A. So far as common knowledge,

I can only speak for Tazewell County.

Q. Have you heard these same reports with respect to other areas of Virginia? A. Yes, sir.

* * * * * *

1030 Q. All right, sir. Mr. Shufflebarger, do these small truck mines usually open and close throughout the year, or do they operate more or less continuously? A. Well, the larger ones are in operation I would say continuously. They might be shut down for a week or two during the year, or they might possibly be shut down longer than that, but generally speaking they're continuously in operation. The smaller ones, however, might operate three months, six months, or a year, for a very indefinite duration.

Q. What period of the year are these mines most likely to be in operation? A. By period, do you mean the number of months or

1031 the names of the months?

Q. The season of the year, the months, generally speaking.

A. Well, I would say the peak of the number of employees, as well as the number of mines, would be from the 1st or 15th of October to about the 1st of April; somewhere along in there.

Q. Your survey, then, was conducted during a period of peak operations? A. Yes, sir.

Q. Were all of the mines that you included in your survey actually in operation as of the date the survey was conducted? A. Yes, sir.

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BY MR. COMBS:

1036 Q. Now, Mr. Shufflebarger, you testified about sub-leasing and contracting. Now, let's deal with the two things separately. First, subleasing. Just what do you know about that device, as you call it, yourself? A. Well sub-leasing is a general term. Ordinarily, where a lessee has a lease on a piece of land and he in turn sub-lets it or a portion of it to somebody else, then that is referred to as a sub-lease arrangement.

Q. Now, the sub-lessee, does he have a contractual relationship between the union and himself, or does the contract of the main lessor between the union and the operator control? A. Well, I understand that in some instances he does.

Q. In some instances he does what? A. He does have a contract with the union.

Q. The sub-lessee? A. Yes, sir.

Q. Now, in what way would a situation like that cause the contract to be violated by paying less wages than if the original lessor was mining the coal? In what way? A. Well, if the sub-lessee was a
37 signatory to the contract and was paying the union scale, it wouldn't affect the situation, as I see it.

Q. Now, you said, as I recall, that you thought that the wage scale was not being paid by two devices, as I remember, the sub-leasing device and the gang work device A. Yes, sir.

Q. Now, how does that sub-leasing differ from any other contractual relation ship between parties that would lend and conduce itself to a violation? A. Well, if the sub-lessee was not a union signatory or not paying the union wages and was producing coal at a wage under the union wage that is being delivered back to the lessor, that would certainly be coal produced at less than the $2.245 an hour of the union wage.

Q. But under that situation, Mr. Shufflebarger, there would be no reflection on Exhibit 8, if there was no contractual relationship.

PRESIDING OFFICER GRANT: There wouldn't be any breach, because there wouldn't be any contract.

MR. COMBS: That's right.

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38 BY MR. COMBS:

Q. Now, Mr. Shufflebarger, on the sub-contract, can you name a mine that has a contract with the union and the sub-lessee and the operator involved are violating that contract in not paying the wage

scale under the contract? A. To my personal knowledge, I do not.

Q. You said you had heard of such situations. Could you tell me what mine you have heard of that such a situation exists? Name the mine. A. I have heard that it applies to union mines in Tazewell County. Jewell Ridge Coal Corporation.

Q. All right. Let's stop right there. Now, on Jewell Ridge Coal Corporation, who told you that? Where did you hear it? A. I don't know that I could recall any specific person that told me that, Mr. Combs.

Q. You say you've heard that Jewell Ridge Coal Corporation is doing that. Would you say that the party that told you that was an official of the coal company, Jewell Ridge? A. No, sir.

Q. Was he an official of the union? A. No, sir.

Q. Would you say that the person who told you that would lead you to believe that either the officials of the union or the coal company knew that situation existed? A. Did they know that the officials of the company or the union knew that it existed?

1039 Q. Yes, sir, of their own knowledge. A. Well, I would assume that they did think that they did--

Q. I'm not asking you to assume, now. A. I couldn't answer that.

Q. Now, how many men would you say would be involved in the situation at Jewell Ridge that you heard about? Would it be 10 men? A. Well, I understand that there are five, six, or seven truck mines operated on Jewell Ridge leases on the Tazewell County side and a considerable number on the Buchanan County side. I do not have definite information as to the number of persons employed in each of those operations. As an average for the other truck mines in the section, it would run four, six, eight, or 10 men.

Q. You wouldn't know whether it was five, 10, 15, 20, or what? A. I would assume that on the seven operations which I believe that Jewell Ridge has operated on its leases in Tazewell County, oh, it would run 28 to 45 men employed in those.

Q. Now, would you say, Mr. Shufflebarger, that these sub-lessees on Jewell Ridge's property have a contract with the United Mine Workers? A. I am told that they do.

Q. Have you seen them on any of these exhibits here? A. I don't think I'd recognize them by name, if I saw them, Mr. Combs.

Q. In other words, you heard someone else heard that somewhere on Jewell Ridge's property that there were a few sub-lessees and that they had heard or you assumed that they had a contract or somebody had heard that they may not be paying the wage scale that was in the union contract? That's about what it stacks up to, isn't it? A. It might go that far, yes, sir.

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THE WITNESS: Mr. Combs, if I may make one explanation here with reference to the sub-lessee or contractor. You said we wanted to discuss them separately.

MR. COMBS: Yes.

THE WITNESS: Those terms are used in our area almost interchangeably, regardless of the specific contractual relationship. Strictly speaking, the contractual relationship which is the one most prevalently used throughout our section is this: Assuming that I have a lease of coal land I don't do any of the mining myself, instead of strictly sub-leasing portions of that to you and to you and to you, I contract with you to produce coal from a certain portion of that and deliver it to my loading dock for a specific price per ton.

MR. COMBS: Now, I get your explanation there. Have you finished?

THE WITNESS: Yes, sir. And both a sub-lessee agreement and a contractual agreement are used interchangeably in our area when they speak of some of these devices such as I have described.

BY MR. COMBS:

Q. Now, in a situation of that kind--you're a lawyer--would you say they are independent contractors? A. Yes, sir.

Q. And they're not employees of the company? A. Right. That is my professional opinion, sir.

Q. In a situation of that kind, it wouldn't be the owners who would have a contractual relationship with the Mine Workers; is that

1041 right? A. Right.

Q. So how could there be a violation of the contract there on that? A. Well, I'm not familiar with the U. M. W. A. contract, Mr. Combs, as to how that might be a violation.

Q. All right. Now, on this gang work, you say there's no essential difference between the two; that you use them interchangeably? A. Well, now, with reference to gang work, as I understand, instead of the contract or sub-lease being given to one individual, it's given to a group of men, four or five or six men, jointly, and they go in there and pool their resources and labor and energy to produce the product and then divide the net return among themselves according to the number.

Q. The contract is made between the coal operator and a group of individuals? A. Yes, sir.

Q. But the union doesn't enter into that situation? A. No, sir.

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1042 Q. Now, on the gang work proposition, even assuming that it exists for the purpose of asking this question, it doesn't necessarily mean that where gang work exists that they're not making the prevailing wage, does it? A. No, sir.

Q. I believe you heard Mr. Southern testify here yesterday that some of these individuals under such situations make as much as $30 a day. A. Yes, sir.

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1065 BY MR. AMOS:

Q. I believe you stated in cross examination that you did not of your own knowledge know of any union mine that was not paying the contract wage? A. That's correct, sir.

Q. And it follows, I take it, that you do not know of your own knowledge that Jewell Ridge Coal Company is cheating under this contract by employing gang workers? A. No, sir; I do not.

Q. Are you familiar with the union contract? A. I've only seen it since I've been here at these hearings.

1066 Q. Then you are not familiar with it? A. No, sir. I've read it over casually once or twice since I've been here.

Q. Do you know whether it permits gang work where they guarantee men loading the minimum or $2.245 an hour? A. I recall that there is some provision about permitting group work in isolated sections. I believe that is the way it is expressed.

Q. You could then have gang work under the union contract; couldn't you? A. If that is true; yes, sir.

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1081 O. L. GIBSON

a witness appearing in behalf of the Virginia Coal Operators, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. COHEN:

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1082 Q. And your operation is a non-union operation? A. Yes, sir.

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1083 Q. Do you pay the union wage? A. No, sir.

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CROSS EXAMINATION

BY MR. SUSSHOLZ:

Q. How long have you lived in Wise County? A. I've been in Wise County since 1941.

Q. During that period of time have you come to learn the names of many of the mine operators who are signatories to these union collective bargaining agreements? A. Well, yes, I know some of them. I've been one myself in the Virginia Coal Operators Association for three years during the wartime.

1084 Q. Have you heard whether or not any of these signatories to the collective bargaining agreement are not actually paying the minimum

wage in your area? A. No, sir; I have not.

Q. You have heard nothing with respect to that subject? A. No, sir.

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1095 J. P. SHOCKEY

a witness appearing in behalf of the Virginia Coal Operators, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. COHEN:

Q. What is your name, sir? A. J. P. Shockey.

Q. Where do you live, Mr. Shockey? A. I live at Red Ash, Virginia, Tazewell County

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1101 Q. The company that you used to operate was called what?

1102 A. Well, we had two, Swords Creek Mining operation and the other New Garden Coal operation

Q. Now, the Swords Creek Mining Corporation was located at Swords Creek, Virginia? A. Yes, sir.

Q. In Tazewell County? A. In Russell County.

Q. And was that a union mine, that is, was it a signatory to a union contract? A. Yes, sir

Q. What happened to that mine? A. Well, the wages got too high or the coal was too expensive to mine. We had to shut the mine down to keep from losing too much money.

Q. You shut the mine down when? A. I believe it was in 1952; I believe it was. It's on there (indicating).

Q. It was shut down in about June, 1952; in other words, about May 31st when it was shut down? Your present operation is not a union operation; is it? A. It's not a mine; it's just for screening coal. We just buy coal for it.

Q. You buy coal and ship it? A. Yes

Q. Do you sell some directly to consumers yourself? A. Yes, sir. We sell some stoke coal and some stove coal

Q. Do you sell through dealers too? A. Well, the Candle Wax Sales Company of Tazewell is the agent for the selling of the coal.

103 Q. Now, you have been present throughout this hearing, haven't you, sir? A. Yes, sir; I've been here quite some time.

Q. You heard the testimony relating to coal loaders earnings in the union mines? A. Yes, sir.

Q. Did you have occasion to compile figures relating to the coal loaders' earnings in this Swords Creek mine? A. Yes, sir; I helped on that last week when we were away from here.

BY MR. COMBS:

Q. Would you repeat that again? A. I said I helped to do it, and it was prepared last week when we had this intermission here.

BY MR. COHEN:

Q. What is the coal loaders' wage under the United Mine Workers contract? How is it figured? A. In this particular mine, this happens to be low coal. We have three rates there in Virginia. We have coal, machine loading, per ton, over 48 inches, 74 cents per ton; 76 cents for 42 inches to 48 inches; and 78 cents for seams 42 inches and under. Now that is the tonnage for this coal for this mine that go from about 26 inches to 32 inches of thickness. Therefore the 78-cents per ton was applicable to the tonnage rate.

Q. How was the wage of the tonnage worker, that is, the piece worker, computed, using that 78-cent figure? A. We took the number of tons the man loaded plus any yardage, if he had taken out slate, and we figured the number of tons by 78 cents plus what the yardage was, and added to that one-ninth, and to that figure add eight twenty-

104 five.

Q. $8.25? A. Yes.

Q. At the time that your mine closed in 1952, how much was that additional amount; was it $8.25? A. Six thirty-five.

Q. $6.35. Now, in putting together your computation of the earnings of the hand loaders in your mines during the last six months of

its operation, how many hand loaders did you have? A. We had 18 at this mine.

Q. There are 18 on that list? A. Yes, sir; eighteen.

* * * * * *

Q. I notice that you have average earnings per shift in the last two columns, and in the next to the last you say average earnings per
1105 shift, and in the last column you say present scale. What does that mean? A. The first column of the two there--this was actually the payroll record when the man was receiving the six thirty-five.

Q. That's right. That means he was receiving 78 cents, plus one-ninth, plus six thirty-five? A. Yes, sir. Now, that is what that figure is, and then in order to bring this up to date so the Examiner could readily understand it, I added $1.90 to that figure which made it eight twenty-five.

Q. I see. The last was figured on the basis of the present eight twenty-five scale? A. Yes, sir.

Q. Which would be 78 cents, plus one-ninth, plus eight twenty-five? A. Yes, sir.

Q. Now, looking down that list, how many men in the first column, that is, the next to the last column, earned as much as $17.96 per day? A. There wasn't any.

Q. None? A. None.

Q. And in the last column, how many men earned as much as $17.96 per day? A. I have three.

Q. Three. And you were paying the union scale? A. Yes, sir.

Q. You did not violate in any way the union contract? A. No, sir. I never had a disagreement, I think.

Q. Would you consider this a representative operation in the Buchanan Tazewell County areas? A. I think that these tonnage figures
1106 and these earnings will generally apply to Swords Creek Mining in Russell County and apply to Raven Red Ash in Tazewell County and New Garden Coal Corporation, and I think it pretty well applies to Jewell Ridge Corporation in Tazewell County

Q. So it is your opinion that based upon these figures, I take it, and your experience, both as an arbitrator and as a superintendent, that the majority of hand loaders under the union contract do not earn as much as $17.96 a day? A. Well, that's our experience.

Q. Now, included in these figures for the piece work men is portal to portal pay; is it not? A. Yes, sir.

Q. What is portal to portal pay for piece men as you understand it? A. I understand that is the ninth.

Q. That is the one-ninth? A. Yes, sir.

Q. And that varies, does it, with the amount of tonnage that a man is able to mine? A. Yes, sir.

Q. Now, if a piece worker comes to the mine and does not go into the mine but goes away, does he receive any pay during the day for the day? A. You mean, just comes to the mine? No, sir; he doesn't receive any.

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1107 Q. How was this chart compiled? A. These figures were just taken off the payroll of what these men earned. We couldn't bring the payroll sheets up here, so I got this engineer of ours to just take it off the payroll. We went over these figures, the engineer set it up, and we checked it against the payroll.

Q. So those are actual payroll figures? A. Yes, name after name.

Q. Those figures appear on your social security forms? A. Yes, sir.

Q. And appear on your books, the permanent books of your company? A. Yes, sir.

MR. COMBS: Mr. Examiner, we are going to object to the admission of this chart and the testimony thereon, because on its face it shows, out of the enormous industry that we have, it shows 18 coal loaders that worked in December of '51--January of '51, February of '51, March of '51 --

MR. COHEN: '52, sir.

1108 MR. COMBS: '52; pardon me. They skip the first half of April of '52, worked the last half of April and May of 1952, and based upon the tonnage of those selected men who admittedly were in a low seam of coal, an attempt was made here to project a wage scale that was not even in existence at that time. And then based on that assumption of that smaller representative odd number of men, and that type of projection, they say that that should be the typical earnings in the industry now. I don't think that the calculations and everything on its face shows that it is not relevant or material to the finding of the prevailing wage rate as far as the coal miners are concerned now, so we are going to object to the admission of this chart and the testimony from it.

MR. COHEN: In response to that, the witness has testified his familiarity with the wage scale, that this was the wage scale that was paid, that it conformed with the contract, that he has computed it both upon the basis of the wage scale existing as of that time and the present wage scale, and that it is representative of the earnings of similar employees in similar mines in that general area. I submit, Mr. Examiner, that it is certainly admissible in evidence.

PRESIDING OFFICER GRANT: I don't have any doubt about its admissibility, The question raised--the objection Mr. Combs made goes to the weight I guess I think it is perfectly competent evidence.

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1109 BY MR. COHEN:

Q Now, we were discussing the matter of portal to portal pay. I think your testimony was that with respect to piece workers, that is, tonnage workers, that the pay for this particular company was 78 cents a ton, plus one-ninth, plus eight twenty-five -- sixty thirty-five as of the time that you operated the company? A 78 cents a ton plus the yardage, plus the ninth, plus the six thirty-five

Q. Now, what part of that compensation was portal to portal?

A. We figure that's the ninth in there.

Q. One ninth is portal to portal. What do you understand portal to portal to mean? A. That's the time the man enters the mine until he gets back outside, the time consumed for it.

Q. And you have been familiar with the various developments of the United Mine Workers contracts so that you know the one-ninth is the portal to portal pay for tonnage workers; is that correct, sir? A. I think the contract says that. That is the '45 scale I am referring to. "For all inside employees a work day of nine hours from portal to portal is established, including a staggered fifteen minutes for lunch, and without any intermission or suspension of operation throughout the day. Of these nine hours, seven hours shall be paid for at straight rate, the eighth hour shall be paid for at time and one-half, and the ninth hour shall be paid for at the flat rate of $1.50 ($1.00 at time and one-half) for each inside day worker. Tonnage, yardage, deadwork or footage workers shall be paid full earnings predicated upon the basic tonnage, yardage, deadwork and footage rates that existed on March 31,
1110 1943. As payment for travel and overtime beyond seven hours per day, there shall be added to the tonnage worker's earnings one-ninth of his daily earnings."

MR. BOYLE: Is that the latest compilation?

THE WITNESS: This has been carried over.

BY MR. COHEN:

Q. Later on the contract was reduced to 8 hours and the one-ninth was retained; isn't that correct, sir? A. Yes.

Q. So there wasn't any overtime aspects of that; it was just portal to portal? A. That's right

Q. And that is the portal to portal pay that is in effect today? Now, that of course will vary with the amounts of tonnage and the other emoluments that may be received by tonnage workers; is that correct? A. Yes, sir

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113 Q As I understand your testimony, sir, it isn't you state that

these are typical production figures, but it is you are stating that there are instances where men working on a hand-loading basis earn less than $17.96 a ton? A. Yes.

Q. And that that is particularly true in those thin seams that exist in your area? A. Yes. Now, as I say, and I added to that, what
1114 we are afraid of, if the Examiner would set $17.96, then they would come along with a clause in the contract some day like they did machine workers a long time ago that we would have to make up to the $17.96 and that would increase our costs.

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1115 Q. We were talking about portal to portal, sir. Could you tell me what the portal to portal pay is for the shift men based upon the union contracts you have there before you? A No, sir; I can't exactly tell you that. I can tell you what it alludes to. If a day worker enters a mine and cannot work, he comes out and you pay him for two hours for the day. In other words, if he goes in on a trip and finds out down there he can't work, maybe he comes on out; we have to pay him two hours travel time.

Q Two hours travel time? A Yes.

Q If he does work then his actual time of travel from the portal to the point where he works is paid to him; is it not, as a part of his wage? A. Yes, sir.

1116 Q. So that when he does work his portal to portal pay consists of whatever time it takes for him to proceed from the entrance of the mine to the point where he starts work, multiplied by whatever his hourly wage is? A Yes.

Q And that is true on his departure from work where he leaves the point where he is working and returns to the portal where he leaves the mine and that time is taken and multiplied against his hourly wage and that becomes a part of his pay? A Yes

Q That you call portal to portal? A That's what I say it is; I don't know

Q. You should know, shouldn't you, since you were -- A. I know this that if a man goes in the mine in the morning, we can't work him, we bring him right out, we've got to pay him two hours. That's for travel.

Q. That is provided in the contract? A. Yes, sir.

PRESIDING OFFICER GRANT: But if he does go into the mine and works, he gets paid for that travel time in accordance with your testimony?

THE WITNESS: Yes.

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1118 BY MR. COHEN:

Q. That is all I have asked you about. You don't know what the union mines are paying? A. What the union mines are paying?

1119 Q. Yes. A. You mean the wages?

Q. Yes. A. They're paying according to the union.

Q. Are you sure they are paying according to the union? A. I think they are.

Q. What did you say? A. I think they would be. All you hear is some rumors that the men are not making big wages. I hear it occasionally, I don't know what grounds there is for it.

MR. COMBS: Mr Cohen, I think you are kind of sneaking a little something out of the witness. He said a while ago that he didn't know of any coal operator that wasn't paying the union scale. He said he had no knowledge of it.

THE WITNESS: He asked me a question, and I said I heard rumors of it and that is what you have been hearing here all day.

(Laughter)

MR. W. P. OWENS: Did you ever hear the song, Rumors are Flying? That's where they got it, right here.

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125 BY MR. COHEN:

Q. Mr Shockey, what is the custom and practice with reference to the payment of portal-to-portal pay in the Virginia area? A. Well,

on a hand-loader pieceworker we pay a ninth.

Q. I'm asking you about the custom and practice with respect to portal-to-portal pay. I've already asked you about the provisions of the union contract. Now I'm asking you what the custom and practice with reference to non-union mines is. A. Oh, they don't pay any. They don't pay any portal-to-portal.

Q. They don't now? A. No, sir.

Q. Never have? A. No.

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1128 CROSS EXAMINATION

BY MR. FLANDERS:

Q. Mr. Shockey, how thin would a seam have to be before you could not profitably mine it by hand operations? A. Well, I'd say that
1129 24 inches is about the limit, if the seam is regular; 24 inches. I'd say that's just about as far as I know of that you could go down to.

Q. The thinner the seam, the smaller the tonnage per man--

A. That's right.

Q. -- that will be recovered? A. Yes, sir.

Q. I believe you may have stated this once before, but would you state it again: Will you state what the thickness of the seam was in the Swords Creek Mining Corporation during the period that this payroll check covers? A. It run around 26 to 28 inches.

Q. I believe you said about 24 inches was as thin as you could get and operate profitably by hand operations? A. Yes, sir.

Q. Was this a hand operation? A. Yes, sir, hand-loading.

Q. So that in this particular instance you were approaching the limit at which you could operate by hand-loading? A. Well, I think we did, because we couldn't make any money on it.

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1139 BY MR. GRONEWALD

Q. Are the workers in your plant covered by the U. M. W. contract? A No, sir Now, the fellows who I buy coal from, from the union mines--

Q. No, I mean in your own plant. A. No. I pay them--I don't have a contract with the United Mine Workers but those men belong to the union and they get the union pay.

Q. Which men? A. The men on the tipple, the men in the processing plant.

Q. The men that you employ? A. Yes, sir.

Q. Receive the union wages? A. Yes, sir.

Q. And those union wages are a minimum of $2.245 an hour? A. Well, whatever this book says, whatever it says for tipple men, that's what it is.

Q. Does it say that the wages for tipple men is less or more than $2.245 an hour, Mr. Shockey? A. Well, let's say they're the same as what the book specified.

MR. BOYLE: For a matter of clarification, Mr. Examiner, may I inject myself?

1140 Isn't it a fact, Mr. Shockey, that the tipple employees, cleaning and preparation employees, under the contract referred to by you, the hourly rate is higher than $2.245? Isn't that true?

THE WITNESS: You're right. It's what that book says for outside employees.

MR. BOYLE: Isn't it two-point-three-something?

THE WITNESS: Yes, sir. I think that's right.

MR. BOYLE: I think that answers Mr. Gronewald's question.

THE WITNESS: In other words, there is no violation of the wages paid by the union for outside labor.

MR. GRONEWALD: The prior question was whether the United Mine Workers contract covers separate preparation plants.

Your answer is that it does?

THE WITNESS: My answer is we run on the wages but don't have a contract. And I would say about that that that's a matter of agreement with the District president and we're not too far off.

1142 BY MR. SUSSHOLZ:

Q. Did I understand you correctly to say that your operation pays union wages to tipple operators? A. Yes, sir.

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Q. Now, so far as other outfits, are there other organizations that perform the same type of function that you do, that your organization does, in the area in which you operate? A. Well, I'd say that
1143 the Norma Mining Company is about the same way. We have a lease up there and divide it up into various leases and these truckers bring in the coal.

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Q. Yes, and are there any others besides the Norma Mining Company? A. Well, there's one there that handles some. I don't know what per cent. In other words, the Raven Red Ash Company.

Q. Now, do you know what they pay their tipple operators? A. No, sir--Well, I'd say they pay them union wages. I think they're organized there.

Q. You think they're under contract with the union themselves? A. Yes.

Q. How about the Norma Mining Company, is that under contract?
1144 A. No, they're free.

Q. Do you know what they pay? A. They pay about--I don't know exactly the scale of wages, but they're pretty near what the union contract is

Q. Is that on the basis of personal knowledge? A. I don't know. I haven't looked at the payroll, but I know it's not far off from it.

Q. Is that on the basis of your guess? You don't have any actual facts as to that, do you, sir? A. I know what it was when we started out, and that's been about five years ago, and right now I don't know what it is, but I'd say it's not far off.

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1185 ROBERT L. STEARNS, JR.,

having been previously sworn, resumed the stand and testified further as follows:

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1188 CROSS EXAMINATION

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1198 BY MR. COHEN:

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Q. When you were operating under the UMW contract, piece workers were paid, that is, those engaged in hand loading a certain amount per ton, plus one-ninth, plus eight and a quarter; isn't that correct, sir? A. Yes, sir.

Q. Do you know whether or not any piece workers ever earned less than $17.96 a day under that arrangement? A. Many of them. Most of

1199 them.

Q. Most of them earned less than $17.96 a day? A. Yes.

MR. COMBS: Now, what are you confining that to, the whole industry or his companies?

MR. COHEN: I am talking about his company now.

MR. COMBS: His one company?

MR. COHEN: Yes.

BY MR. COHEN:

Q. And that of course included the yardage allowance? A. Yes, sir.

Q. And you say that most of the men in your company who are operating on a piece work basis earn less than the $17.96 per day? A. Yes, sir.

Q. Do you have any knowledge or understanding that that situation exists elsewhere in the coal fields? A Mr. Cohen, it is bound to exist elsewhere with a very slight difference in the tonnage rates as the coal gets larger. It is obvious that a man--I am talking about mining men now, piece workers--a man in 6-foot coal can load considerably more tonnage than a man in say 42-inch coal or 35-inch coal. Our

locality will show that our coal averages about 42 inches in the underground mines. That means that we have some coal larger, and it means that we are also mining considerable areas as low as thirty-five or thirty-four and even 33 inches. Now, it just doesn't add up, with the slight difference, as you will notice, in the figures that I read you here, there is only a difference in the rate of 54 inches and over at $1.05, and that is fairly big coal against 30 to 33-inch coal of $1.20. There's only
1200 a difference of 15 cents a ton there, and yet you have a man in one case working in a stooped position about as high as this desk, and in another case he is working in a standing up position. Under those conditions the man can physically load more coal a day in the upright posture, of course.

Q. In other words, it is your position that in seams, say, of under four feet that the average man would not earn $17.96 a day under the UMW contract? A. I would say that would be about the breaking point. I think in coal less than four feet he wouldn't earn the average wage, and in coal over four feet he would earn more.

Q. The Government has placed in evidence the Bituminous Coal and Lignite 1953 Survey of the United States Department of the Interior, Bureau of Mines. On page 8 of that publication released December 1, 1954, there is a chart showing the extent, the percentage of the bituminous coal produced in the ten largest coal producing States and the total United States by thickness of seams mined. Now, looking over that chart, sir, would you first tell me what the thickness of seam four feet and under is for Kentucky? A. I've never seen this exhibit before. I would have to study it a little bit, Mr. Cohen. 51 percent according to this chart is less than four feet in Kentucky.

Q. And in Virginia? A. 40 percent.

Q. And the total United States? A. 35 percent.

Q. Now, on the basis of that chart and your knowledge of coal production, would you state that the prevailing minimum wage for piece workers in the Bituminous Coal Industry is $17.96? A. In what State
1201 now?

Q. For the United States. A. From reading the States that I have just mentioned, I would say, no, on the average.

Q. And you would also state that there are a substantial number of workers who a getting less than $17.96? A. Under the United Mine Workers contract?

Q. Under the United Mine Workers contract. A. Yes, sir.

Q. Isn't there a custom or practice in the coal industry, Bituminous Coal Industry, based upon your knowledge of the industry, and as I understand you were the director of many associations covering a substantial portion of the industry, is there a custom or practice to pay portal to portal pay? A. Under the United Mine Workers contract?

Q. No, outside of the United Mine Workers contract. A. No.

Q. There is no practice now, and there never has been? A. I can't cover quite as broad a territory as you are asking about, Mr. Cohen from my personal knowledge.

Q. On the basis of your knowledge. A. On the basis of my knowledge that is correct.

Q. There is no custom or practice now nor never has been? A. Yes.

Q. Now, does the United Mine Workers contract call for payment of portal to portal pay? A. Yes, sir.

1202 Q. What do you understand portal to portal pay to be under the United Mine Workers contract? First, with respect to piece workers and then with respect to shift workers. A. Let me take you to the opposite. Let me take you to the shift workers first. The shift worker, under the portal to portal, is paid from the time the man enters the portal. Now, that would vary at each mine and in a large degree for the men within that mine. Some of those men might only have to go underground say a quarter of a mile before they start their regular duties. Some of those men might have to go underground and we had one such mine, as far as four miles, before they would start their regular duties. You can see that as you first start a mine the portal to portal payment on the day workers is not of any particular significance, but as

your mine gets further under the hill and it takes longer to transport those men in and out then it is of quite a lot of significance because they are paid from the time they enter that portal until the time that they come out of that portal the same as if they were at productive work. Now, on the piece workers, let us assume a rate of 63 cents per ton. Add one-ninth to that, which is 7 cents, and you would get 70 cents. That 70 cents then is multiplied by the number of tons that man works on that shift. Into that figure is added $3.25 under the United Mine Worker contract. Hence, a man loading 10 tons would get $7 plus eight twenty-five or $15.25. A man loading five tons would get $3.50 plus eight and a quarter of $11.75. A man loading two tons would get $1.40 plus eight twenty-five or $9.65. Those are just used as examples. I hardly think that any operator who had a man who consistently loaded two tons would keep him on very long because on that scale, that coal loading rate would amount to $4.825 a ton if he went in and only loaded two tons.

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1229 BY MR. SUSSHOLZ:

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Q. Now, isn't it a fact that certain types of coal cannot compete with government specifications irrespective of the price? A. Yes, sir.

Q. What types are those, sir, and do you know what areas they come from? A. I can describe them, but I can't tell the areas that they come from. There are certain plants that the government burns

1230 coal in that have been designed to burn very high quality coal. There are other plants that have been designed to burn low quality coal or practically anything. The TVA plants, with which I am the most familiar, have been designed to burn a low quality coal. They can burn West Kentucky coal in the plants that are served by the West Kentucky fields, and they have designed their Eastern Kentucky plants, Eastern Tennessee plants also to be able to burn a fairly low-grade coal. But now they do have other operations exclusive of the TVA where the plants have been designed to burn a higher type of fuel than some of our coals can meet. So that under any conditions they would not accept a bid on coals that were less than the specification that they set out in their

bid invitation.

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1547 B. W. DERINGER,

a witness appearing in behalf of the Central Pennsylvania Coal Producers Association, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AMOS:

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1548 Q. What is your occupation? A. My present occupation is Labor Commissioner for the Central Pennsylvania Coal Producers Association, Altoona, Pennsylvania.

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Q. * * * From your knowledge, state for the record what the percentages are in eastern Pennsylvania as classified by the Bureau of Mines and as classified in the present blank that is being sent out by the Census Bureau for a 1954 census. A. Based on 1953 figures--and this is broken
1549 down into deep and strip tonnage--1953 in deep mines in the eastern Pennsylvania area, there were 20, 233, 746 tons produced under union contract, out of a total of 23, 219, 928 tons, or 87. 1 per cent.

The number of men employed in those mines producing the 20 million and some odd thousand tons was 19, 143, out of a total of 23, 197, or 82. 5 per cent of the total men.

Q. When you speak of union contract, do you mean the contract with the United Mine Workers of America? A. Yes, sir. Any time I mention contract, it means a contract that was negotiated between the United Mine Workers and the Central Pennsylvania Coal Producers Association.

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1552 Q. Now, let's go back to the figures. A. Now, I had testified concerning the deep tonnage.

Q. That's right. A. Now, out of a total of 12,555,869 tons, there was 1,734,384 tons produced under contract with the United Mine Workers, or a percentage of 13.8.

Q. Now, was that deep or strip? A. That was strip. Out of a total of 5,120 men, there were 639 employed by those contract producers, or a percentage of 12.5.

The total of those two, there was 35,775,797 tons produced, and 21,968,130 tons were produced under contract with the United Mine Workers, or a percentage of 61.4.

1553 The number of men, there was a total of 28,317, with 19,782 of them under contract with the United Mine Workers, or a percentage figure of 69.9. Now, those figures are for mines that I know all have union contracts.

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1554 Q. Just tell the Examiner the situation as to your hand loaders, if you know; I mean by that what they earned in 1953, if you're in a position to testify as to that, and their average earnings, and so on. A. Well, our hand loaders load coal onto conveyors and into mine cars by hand and are paid on a tonnage rate. We also have a very, very slight amount of what is commonly called pick work, which is a tonnage rate. Our hand loaders in the year 1953 averaged $2.51 per hour, which is considerably in excess of the $2.245 figure asked here, and we in central Pennsylvania are very much interested in the preservation of those tonnage rates.

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1556 Q. Mr. Deringer, to clarify it, pick mining, pick hammer, hand loading, and conveyor loading are all considered hand loading in Pennsylvania. They're different forms of hand loading? A. That's exactly right, sir.

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1557 MR. COHEN: There are no deductions from this, are there?

THE WITNESS: No, that was their earnings, gross.

MR. COHEN: I mean there are no deductions from this rate for

any purpose whatsoever, such as preparing or anything like that?

THE WITNESS: No.

MR. COHEN: And you arrived at an average of $2.51--

THE WITNESS: Per hour.

MR. COHEN: Per hour?

THE WITNESS: Yes.

1558 MR. COHEN: Using all of the men that are employed in these various job classifications?

THE WITNESS: Yes, sir.

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1561 CROSS EXAMINATION

BY MR. BUSSHOLZ:

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1570 Q. Where did you get those figures from, sir? A. Those figures came from the State reports of 1953.

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1652 Q. In compiling that figure of $2.51, was weight given to the tonnage that each company produced and to the variance in number of employees that each company had? A. Yes, it's figured on a weighted basis.

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1656 GEORGE A. LAMB,

a witness recalled in behalf of Pittsburgh Consolidation Coal Company, having been previously duly sworn, testified as follows:

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1728 BY MR. AMOS:

Q. Mr. Lamb, the other day Mr. Deringer of southern Pennsylvania was asked to give certain earnings of the tonnage workers. Do you have any information on the earnings of tonnage workers as compiled, and if so would you tell us what those earnings are as you have it? A. I do have a study made on all employees as reported covering a large part of the Bituminous Coal Industry in 1947. Now, this is the only study I know of a general character that breaks down your tonnage

employees and also the day men. This was prepared in 1948 in anticipation of basic data needed regarding a wage conference in the offing. This study while published its release has been more or less restricted. I happen to have a copy here, and as a result I have summarized on one sheet the results of this. Now, while this goes back into 1947, the wage scales for the tonnage workers--I'm talking about the piece rates or tonnage rates--have not changed. As you will remember they have not changed since 1941, and I believe this gives a good sample or even more of a sample of the application of earnings under tonnage rates as such.

MR. COHEN: Mr. Examiner, I am going to object to this. In the first place, the rates have been changed. They've gone up to eight and a quarter since that time, and you have your tonnage rate plus your yardage rate plus one-ninth plus eight and a quarter. It was six thirty-five at the time.

MR. AMOS: The basic rates have not changed.

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1736 BY MR. AMOS:

Q. I believe the last question was, what percent of the industry or by districts or nationally did this survey in 1947 cover? A. It covered tonnage in Districts 1 through 4, 7, 8, 10, 11, 13, 16, 17, 19, 20, 22 and 23, and it represented 47 percent of total U.S. production.

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Q. That is the production for the month of October? A. 47 percent of the total production for the United States for the month of October.

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1737 Q. Mr. Lamb, will you tell what this George A. Lamb Exhibit No. 7 represents and how it was made? A. This exhibit shows the straight-time earnings of piece workers at rates that prevailed in 1947 and that prevail today. In other words, there is no difference between the rates used in this survey as compared to the rates that are in effect today in the union scale.

1738 Q. Does this schedule take into effect the eight and a quarter plus

one-ninth? A. No, it doesn't.

BY MR. COHEN:

Q. Wait a minute. Does it take into effect the width of seams? A. This takes into account all the tonnage rates that were reported for these majority of districts spread over the country. It is, I think, one of the best studies that has ever been made on piecerate earnings.

Q. Would you answer my question, sir? It did take into effect the width of seams? A. It would do that, because it takes into account all the different tonnage rates, you see, which reflect the width of seam.

Q. And in any reductions of the rates by reason of-- A. These are actual earnings reported on payrolls.

Q. And the basis of district agreements that would apply? A. That is true. These are taken from actual payrolls of the particular companies. Would you state your question again?

BY MR. AMOS:

Q. I asked you if this took into account the $8.25 plus the one-ninth, or whatever it was, in 1947? A. It does not take into account the $8.25, but it does show the one-ninth which became effective, as I remember, in 1945. Now, in that respect a hand loader today gets $8.25 for entering the mine. If he wants to earn the $17.96 or the proposed minimum, say in Area A, daily, he must get $9.71 additional or that would be $1.21 an hour. Now, this shows that on straight-time earnings, plus the one-ninth, in the United States as far as these districts is concerned, in addition to the $8.25 he gets $1.36 an hour. So
739 that his total earnings then --

BY MR. COHEN:

Q. In addition, you say, he gets $1.36? A. In addition to the $8.25.

Q. I see. A. Now, the $8.25 represents $1.03 a day, I mean, $1.03 per hour. $1.03 per hour added to the $1.36 is $2.39, you see, that he would earn on the average per day.

Q. Well, wasn't he getting $6.35 instead of $8.25? A. He was getting at that time, I believe--just a moment; I'll give you the figures.

(Pause)

Q. $3.05? A. $3.05 at that time; that is correct.

Q. And isn't that $3.05 included here in this computation? A. No, no; this is simply the straight-time earnings for the piece-rates.

Q. Do you have the study made by the Bituminous Coal Operators Statistical Committee before you? A. I do.

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Q. Incidentally, who is the Bituminous Coal Operators Statistical Committee? A. That was a joint committee set up in 1948 prior to the negotiations of the 1948 wage scale.

1740 Q. Set up by whom? A. Set up by the Bituminous Coal Industry.

Q. By the operators under the union scale? A. Under the union scale; that is correct.

BY MR. AMOS:

Q. That included Virginia? A. That is correct.

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1741 Q. Have you made a survey, or, has a survey been made of a similar period or of a period in 1953, and if so state what period? A. Well, I checked all available sources trying to get current information on the earnings of piece workers which are under the same rates as of that time, and I might add there's nothing been published or compiled of the magnitude of this study that was made by the Bituminous Coal Statistical Committee, but I found out that since '47 the earnings of the piece workers on the tonnage rates, piecerates have increased about 10 percent over what they were in '47. This was piecerates only, and I think there is a reason for this. There's been a decline in hand loading with the increase in mechanization and the hand loading mines that remain would be the more efficient hand loading mines in general, and the chances for loading and earning would be better. So that under the union contract the hand loaders are making 10 percent more today than they were in '47. They're making more on the piecerates, and of course they have an increase in the start rate, and the two added together give

them an average of around $2.50 an hour. That corresponds closely to what Mr. Deringer said yesterday where in his district the average was $2.51.

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772 PAUL FAHEY

a witness appearing in behalf of the Tennessee Valley Authority, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FREEMAN:

Q. Will you please give your name and your position with TVA? A. My name is Paul Fahey. I am Director of Materials for the Tennessee Valley Authority. Part of my responsibility is the procurement of coal.

* * * * * *

776 Q. There has been some mention of spot coal purchases by TVA in this proceeding. Is TVA's spot coal purchased on the basis of competitive bids? A. Yes. We buy our spot coal in accordance with Section 9b of the Act, but the procedure is somewhat more streamlined than that of buying on a term basis.

Q. What proportion of TVA's coal is purchased on the spot basis as compared with that which is bought on a term basis? A. By the direction of the Board of Directors of TVA, the Division of Materials is required to purchase not less than 75 percent of the annual purchases on a term basis. In 1954, which was a calendar year, we burned 9.3 million tons of coal; 84 percent of that was furnished by term contracts; about 1 percent is what we call emergency coal and 15 percent on a spot basis. TVA added a little over 900,000 tons to its stockpiles on spot purchases.

Q. Has TVA indicated any plans whatsoever for changing the ratio by which it will purchase on a spot basis? A. I know of none, and I think I would if there was any such plans at present.

* * * * * *

1793 GEORGE A LAMB

having been previously sworn, resumed the stand and testified further as follows:

CROSS EXAMINATION (FURTHER)

BY MR. FLANDERS:

* * * * * *

Q. When tonnage workers receive pay for yardage and various other items in addition to the actual tonnage of coal mining, I believe they also receive some pay for dead work; do they not? A. Yes, that is true.

* * * * * *

1820 W. A. BOYLE

a witness recall in behalf of the United Mine Workers of America, having been previously sworn, testified as follows:

DIRECT EXAMINATION

* * * * * *

1827 BY MR. HOPKINS:

* * * * *

1828 Q. * * *Mr. Boyle, inasmuch as there have been various questions raised in these proceedings heretofore, I would like to ask you to state for the record, do you know of any of the coal operators under contract to the United Mine Workers of America that are not paying the scale provided by that joint agreement? A. No, sir.

Q. Now, is this true as well as to all other prevailing minimum rates in the ten localities A to J inclusive as were set out and described in the Secretary's notice of hearing? A. Well, there's no information that there are any operators--

Q. Will you first answer that yes or no? A. Well, I would say, yes.

* * * * * *

1829 BY MR. HOPKINS:

Q. Will you please answer, Mr. Boyle, whether or not it is true that all prevailing minimum rates, as known to you in all the ten locali-

ties, A to J inclusive, are set forth in the Secretary's notice of hearing, and are being paid under the United Mine Workers of America
1830 contract? A. Yes. There is no information that there are any operators signatory to the National Bituminous Coal Wage Agreement who are either directly or indirectly avoiding payment of the scale provided by the joint agreement. If any such questions or disputes occur, the joint agreement provides under the settlement of local and district disputes clause for an expeditious and efficient manner of adjudicating such questions and settlements are made in accordance with the applicable sections of the National Agreement. It may be the practice among non-union operators, or union operators contemplating repudiation of the union contract to aver that some operators in their areas, signatory to the contract, are paying below the scale. This propaganda could be purposely disseminated in an attempt to discredit the contract prevailing in the bituminous coal industry.

* * * * * *

831 A. The United Mine Workers and the operators signatory to the joint agreement are aware of the motive underlying such statements. The United Mine Workers actively polices the terms of the joint agreement and corrects as rapidly as possible any violations thereof which may occur. In every instance where it is reported to the international headquarters that there is a violation of contract, whether expressed or implied, we forthwith direct the administrative resident officers in charge of the respective district to immediately investigate the complaint. We insist upon the terms of the contract being carried out. I cannot remember of any such case where an operator is alleged to be paying less than the scale having been reported to the international union. With the thousands of mines in the United States under contract with the United Mine Workers, it is physically impossible for the international union to personally investigate each and every complaint which embraces either justified or imaginary contract violations. But whenever such violations are reported these matters receive the immediate attention of our resident officers and the officers of the respective district.

Speaking of complaints involving disputes as to the proper wages to be paid as provided by contract, the overwhelming number of complaints received involve our members who by their own interpretation
1832 of the contract claim rates that may be higher than those actually provided in the contract. I feel confident that the operators will substantiate this contention. In each instance the international union undertakes to bring about a settlement of such disputes in accordance with the terms of the national agreement.

* * * * * *

1851 BY MR. HOPKINS.

Q. Now, Mr. Boyle, please state whether or not it is true a number of coal companies operating under contract with the United Mine Workers at the present time, which are not listed in Exhibit No. 8, whether they are not listed in Exhibit No. 8? A. Oh, yes. We of course only listed those companies which were under contract in 1953. There are many, many companies which have come into existence subsequent to 1953 that are presently producing coal under contract and paying the contract scale rates. By way of example I have here before me the names of 82 coal companies which are currently producing coal under contract with the United Mine Workers of America in the State of Virginia whose names do not appear on the listing of Exhibit No. 8.

Q. Mr. Boyle, have you prepared a list of the 82 companies presently operating under contract with the United Mine Workers of America in the State of Virginia, just referred to? A. I have, sir.

1852 MR. HOPKINS: May I ask that it be identified as Mine Workers Exhibit No. 16, the original going to the Examiner.

* * * * * *

1864 BY MR. HOPKINS

* * * * * *

1867 THE WITNESS:

* * * * * *

1868 * * * I would like to mention here that in checking this list with the contracts in my office, it was revealed that the Altmire and Shick

Coal Company which produced 1,282 tons of coal prior to ceasing operations and the J. F. Woods Coal Company which produced 6,596 tons prior to being sold were under contract. Unfortunately they were not listed on Exhibit 8 for the 1953 production. We do not wish to alter at this late date the total tonnage represented in the exhibit, but I would like to state that this represents an additional 7,787 tons of Pennsylvania coal produced by the members of the United Mine Workers of America.

* * * * * *

869 THE WITNESS: It is quite true that in many instances coal companies are not included in the State report. However, in the preparation of Exhibit 8 I listed all companies under contract with the United Mine Workers and not merely those companies whose production records were published by the State government.

BY MR. HOPKINS:

Q. Mr. Boyle, may I ask you one other question, if that completes your rebuttal as of this time to the Pennsylvania testimony? A. It does.

Q. I should like to ask you this question, inasmuch as it has been previously raised in this case: Please state for the record whether the prevailing and uniform custom in the Bituminous Coal Industry is to compute the workday on a portal to portal basis? A. It is, sir.

Q. Has this prevailed since 1943? A. It has.

Q. And have all contracts that have been negotiated since that time, 1943, without exception, so provided? A. They have.

* * * * * *

871 CROSS EXAMINATION

BY MR. FLANDERS:

Q. Mr. Boyle, is it your testimony that the district agreements which you have introduced in the record contain the basic day rates for inside workers as they existed in 1941 in each of the areas listed in your petition? A. They do, sir. You meant the exhibit which was introduced this morning?

Q. I did, yes. And is it your further testimony that if we take the

wage increases contained in the Appalachian Agreement since 1941 and add them to the basic rates contained in the respective district agreements, we will arrive at the basic day rate for inside workers for each of the areas contained in your petition? A. That is correct, sir. If I understand you correctly, Mr. Flanders, your question was: Would those day rates appearing in the '41 agreements for all localities submitted this morning, if they were properly brought up with the increases from 1941 to 1952 when the last wage increase applied, would they reflect the present wage rates for those classifications in those respective
1872 districts for which we submitted contracts this morning; is that correct?

Q. Yes, sir. A. Yes.

Q. Is it your testimony that all operators who were signatories to the UMW agreement pay hourly rates of not less than the rates set forth in the petition with each respective area with the exception of certain workers classified as 8-hour men? A. That is correct, sir.

* * * * * * *

1876 Q. Mr. Boyle, is it your testimony, with the exception of the 8-hour men that I have just referred to, that in each and every area listed in your petition all contract signatories are required by the terms of their contract to pay not less than the hourly rate specified in your petition for each respective area? A. That is correct.

Q. Could you enumerate the increases that have occurred since 1941 in the national wage agreement? A. Yes, sir.

Q. I would like to have this first with respect to the day rate workers.

A. I can only give it for the day rate workers. Do you want me to go year by year, or did you just want--

Q. I would like to have it year by year. A. Well, in 1941 the
1877 rate of $6.76 for 7-hour day was increased in 1943 by increasing the workday to 8 hours with time and a half for the extra hour, which was an increase of $1.45 in 1943. Then in 1945 there was an increase to $1.50. In 1946 there was an increase to $1.85. In 1947, $1.20. 1948, $1. 1950, 70 cents. 1951, $1.60. 1952, $1.90, which is the sum

total of--I mean which brings it to the present day rate of $17.96 or an hourly rate of $2.245 per hour.

Q. Mr. Boyle, the $6.76 day rate which you gave for 1941 prevailed only in Area A; is that correct? In the other areas the basic rate, as contained in your district agreements, has been submitted in evidence? A. That is true, as indicated in the petition.

Q. And these increases that you have just enumerated should be applied for the other areas to the basic rate for those areas as contained in the district agreements in order to arrive at your present day basic rate? A. That is correct, sir; they were all applied.

Q. I would like to clarify one thing; Mr. Boyle; when the matter came up on your qualifications as an expert--I think it was raised by Mr. Sussholz--Mr. Hopkins enumerated various factors that qualified you and to which you had already testified, but I think you included one that you had not earlier testified to and that was that you were in charge of processing grievances, and I would like to ask you for the record, to hear from you that you are in charge of processing grievances for the United Mine Workers? A. In this respect, Mr. Flanders, that grievances are all handled under the terms of the contract at a local level and then through the districts, and in those instances where a settlement has
78 not been forthcoming, or something of that nature, then and only then am I injected into the dispute.

BY MR. CANTFIL:

Q. Mr. Boyle, with respect to getting back to Exhibit 8 and the listing of those mines, sir, in the event that sometime in 1953, let us say, a contract for a particular mine operator by a contract signatory where the mine changed hands, * * * another operator would come in and sign another contract with the union at a later date then 1953, and consequently there actually would be two different companies operating the same mine but both during 1953, would both those companies, sir, be listed in the UMW exhibit where such situations occurred? A. No. What we have done in our exhibit there, Mr. Cantfil, is that we show only one where the tonnage has been produced by that mine in 1953 by

the successor company, and their listing there, and in any instances where it was possible for me I said in Exhibit 8 this company was formerly owned by a certain individual or certain company.

Q. I see, sir; so the predecessor would not also be listed except in conjunction with the latter listing in connection with the most recent order, that is, of '53? A. That is correct.

* * * * * * *

1884 BY MR. COHEN:

Q What is your official position with the United Mine Workers of America, Mr. Boyle? A. I am sorry, Mr. Cohen, I didn't hear you.

Q. What is your official position with the United Mine Workers of America? A. I am assistant to President John L. Lewis.

Q. Will you enumerate in complete detail your duties in that position? A. Well, my duties are varied and considered many. As an assistant to the President of an international union you can get many assignments and perhaps many assignments that I couldn't enumerate right now. If it pertains to the contracts, I could tell you more specifically on that.

Q. Just tell me what you do, what you are responsible for. A. I am primarily responsible for the Contract Division of the United Mine Workers of America. All contracts are in my office that were signed by the signatories, and I reply to correspondence that might be referred to me from time to time, and in any respect at all whatsoever where I may receive any assignment that may be of interest to the President's office.

Q. Is that all you have to say about that? A. As I say, the assignments could be many and not the same everyday.

Q. Don't you have some sort of specific responsibility that has been delegated to you? A. Yes, the contract work is quite a job in itself,

1885 in the Contract Division.

Q. Contract revision? A. Contract Division.

Q. What do you do in the Contract Division besides have custody of the contracts? A. What do I do with respect to the contracts?

Q. Yes. A. The contracts are all kept on file in our office, and when there are questions as there are here today, why, we have visible

proof that the contracts are there.

Q. Do you do anything else with respect to the contracts? A. I just don't quite understand your question. I don't alter or change the contracts in any respect. I don't have that authority.

Q. Do you police them? A. No, the district offices and the local unions police the contracts. But as I just previously stated, sometimes in some instances there may be called to my attention some alleged violation of the contract or something of that nature that I might intervene on with the district president or the local union for that matter on the subject.

Q. And when you do that you are acting in behalf of the president and not because it is any delegated responsibility of yours; isn't that right? Let me rephrase the question.

MR. HOPKINS: I don't quite understand your question, Mr. Cohen.

MR. COHEN: I understand. It was ambiguous.

BY MR. COHEN:

Q. Has the president delegated to you the responsibility of settling
1886 disputes under the contracts that can't be settled at the district level?
A. That cannot be settled at the district level?

Q. Yes. A. No, sir. The contract by its terms itself says how those settlements will be made.

Q. What do you do in connection with the settlement of disputes? I understood you to testify that you had something to do with the settlement of disputes. A. I don't have anything to do with the settlement itself as such. I have no authority under the terms of the contract to do that, and neither does the President of the International Union have that authority. The contract provides by its explicit terms how the contract, I mean--strike that.

The grievances under dispute, flaws of the contract are provided for in the settlement of local and district disputes clauses of the agreement, and they are supposed to be adjusted in that manner.

PRESIDING OFFICER GRANT: You indicated pretty clearly, Mr. Boyle, I think that grievances came to you, and I think maybe that is

what Mr. Cohen is discussing.

MR. COHEN: I will get around to it.

THE WITNESS: If I did so, then it must have been misleading when I said it either by questioning or by answering.

MR. HOPKINS: I think, Mr. Examiner, Mr. Boyle has testified as he has stated that the settlement of disputes, that the contracts as such have contractual provisions for disputes but he often uses his good offices to settle matters so as to avoid their going into dispute.

MR. COHEN: I would assume so, and I was rather surprised to hear him testify that he had anything to do with the settlement of them, so
1887 I was just asking about them.

MR. HOPKINS: He tries to avoid the disputes.

MR. COHEN: I understand; he doesn't settle disputes.

BY MR. COHEN:

Q. Now, contract violations are generally settled at the district level too; aren't they? A. I would say that they are all settled at the district level.

Q. And do all those contract violations come to your attention? A. No, they do not, sir.

Q. Do any of them come to your attention? A. While they are in the process of a settlement or after they have been settled?

Q. At any time. A. There may be an instance now and then where an individual might feel the settlement has not been properly made under the terms of the contract, and he will ask for information with respect to that. But the contract provides if a settlement has been reached we don't have any authority to change that settlement.

Q. So it would be exceptional circumstances then where any violation would come to your attention? A. I didn't understand the question.

Q. I think the question is quite clear. It would be an exceptional circumstance when any violation would come to your attention? A. I would say, yes, to that because the cases are settled, a great many of them, with the local union itself without even going to the district office.
1888 Q. During this last year, let's say calendar year 1954, how many

violations would you say came to your attention? A. I would have no way of knowing that.

Q. Could you guess? A. No, I couldn't.

Q. Approximate it?

MR. HOPKINS: What do you mean by violations?

MR. COHEN: Violations of union contracts one way or the other.

MR. HOPKINS: On rates or working conditions, any and all provisions?

MR. COHEN: For any reasons.

THE WITNESS: The reason it would be impossible for me to answer that, Mr. Cohen, is that there could be a dozen violations or a dozen cases that happen within a week in a certain area, and I would know nothing about it.

BY MR. COHEN:

Q. I understand that. I am not asking you if you do or do not. I am asking how many came to your attention in 1954? Now, we understand that they are weeded out at the district level. I am just trying to find out how many come to your attention. A. I couldn't approximate how many.

Q. Would it be five? A. In one State or in all of the States?

Q. In all of the States? A. Well, I wouldn't be able to answer that.

Q. Would it be as many as a hundred? A. I wouldn't even venture a guess that it was more or less. Some people are aggrieved, and there would be no case at all because it has already been settled, and we have no method or system set up whereby we record every grievance that is
1889 called to our attention.

Q. I take it that if a grievance is sent to you, you refer it to the district office that has jurisdiction over that particular company where it arose; wouldn't you? A. In those cases that you have in mind --

Q. Don't tell me what I have in mind, sir, because I doubt very much if you know. I doubt if I know myself. But you go right ahead and answer my question, if you will. A. If I understand your question, you

want to know if they send cases in to me before they go to the district office?

Q. When you do get cases that come to you, of any kind of complaint concerning contract violations, you either take care of them yourself or arrange to have them sent back to the district office? In other words, you just don't throw it in the wastebasket; do you? A. No, sir. But as I stated here, when I testified this morning, the greatest number of complaints that I have any recollection of is that where the district office has settled the cases and the men are maintaining that they are entitled to a higher rate than that which is provided by contract, and then they have to be told that the contract provides for a lesser rate than that which they are claiming and that the case has been settled.

Q. Did you have any cases involving, let's say in 1954, the charge that any of the signatories were not paying the rate called for under their agreements? A. Has the national office had any such complaints?

Q. Yes. A. None that I know of, no, sir.

1890 Q. You would know, wouldn't you, sir? A. Yes, sir. I think I should know. Now, wait a minute. I would assume that I would know because that is the contract provision; yes, sir.

Q. Would you know whether the district offices had any such complaints? A. I wouldn't know whether the districts would know or not.

Q. Have you checked to find out whether the district offices know? A. I wouldn't, for this reason, because if a district officer was advised that less than the provided wage scale was being paid, it is his responsibility, and he polices the contract in that area, to see that those rates are properly applied, and I question that any of those would come to us because the district president is policing those contracts to see that proper rates are being paid.

Q. Does he ever make any report of any kind to the national office on any sort of a current basis telling you about violations of the contracts with respect to whether or not the wage called for under the contract is being paid? A. No, sir. He doesn't make reports to me.

Q. You testified that you don't know of any coal operators that are

not paying the union rates. In view of the fact that there are very few complaints of violations that ever get to you, your testimony to that effect can only be based upon your limited knowledge of what the complaints concerning violations are; isn't that true? A. I would only have knowledge of what was called to my attention; that is true, sir.

Q. So that your statement as to whether or not coal operators are paying the rates called for under the union contract doesn't have very much

1891 substantial value?

MR. HOPKINS: Wait a minute; we object to that kind of a question. It answers itself, for whatever it is worth, for whatever probative effect it has, and for whatever weight it may have. He said in his opinion, and he has so testified.

BY MR. COHEN:

Q. You have testified, sir, haven't you, that you know of no cases where a report of violation has been made?

MR. HOPKINS: You are speaking now of less than the wage scale?

MR. COHEN: Yes. I am limiting myself to that in connection with the violation.

THE WITNESS: I have no recollection.

BY MR. COHEN:

Q. And you testified that in the ordinary course of circumstances, if there were such violations, they would be reported to the district president; isn't that correct? A. If the aggrieved party made a case of it, he would report it to the district president.

Q. And you have testified that there are no reports that are made by the district president to the international about such violations, if any? A. That is true.

Q. So on the basis of that you are in no position to know, are you--

MR. HOPKINS: We object to that question.

THE WITNESS: I would like to answer that.

BY MR. COHEN:

Q. --whether or not there are violations of the union wage by the signatories to the union contract, and I would like a yes or no answer to

1892 that question. I am entitled to it.

MR. HOPKINS: You are not entitled to any yes or no answer, Mr. Cohen. Mr. Examiner, if the witness wants to answer it why he will answer it, but I don't think it is such a question that requires a yes or no answer as framed.

THE WITNESS: That reminds me of the question, "Have I quit beating my wife?"

BY MR. COHEN:

Q. Have you?

MR. HOPKINS: Have you?

THE WITNESS: Have you?

MR. COHEN: I would like to have an answer to that question, sir.

PRESIDING OFFICER GRANT: Can you answer the question? Not to the last one?

MR. COHEN: No, not to the last one. I ask that it be stricken out, and I apologize to you.

MR. HOPKINS: The last question contains no value or weight, if that is the question he is insisting upon, because that is a matter of the weight of the evidence.

MR. COHEN: He has testified--need I labor on this point? He has testified on direct examination to that point. Now, I am saying he has nothing really to base it on.

PRESIDING OFFICER GRANT: He has indicated, I think, what basis there is for it, Mr. Cohen, and his earlier testimony will have to be taken in the light of the basis that he has given. I think it is for the deciding officer to say whether or not any weight should be given to it or what weight should be given to it.

* * * * * * *

1932 BY MR. SADUR:

* * * * * * *

Q. Mr. Boyle, you have testified that there is a custom in the mining industry to pay portal to portal in determining an 8-hour rate;

is that correct? A. The contract provides for portal to portal as I so testified.

Q. You indicated it is a custom in the industry to pay portal to portal? A. That is right.

Q. Do you know of any non-contract producers that pay portal to portal? A. I don't know whether they do or not, but there's common knowledge and gossip that I've heard so much about, I understand that some non-union operators are paying portal to portal.

Q. As a matter of fact most of them do not; isn't that true? A. I would say that all of the larger ones from my information, of course it is only this common knowledge that you wanted in the record, is to the effect that they do pay portal to portal.

* * * * * *

1933 BY MR. SUSSHOLZ:

Q. Mr. Boyle, it was your testimony here under oath that I heard not so long ago today that back in 1943, I believe you said, it was the custom to pay portal to portal pay in the coal industry, and since that time that custom has always been incorporated into your union contracts. Now, that was your testimony; wasn't it, sir? A. Came into effect in 1943.

Q. What came into effect in '43, sir?

* * * * * *

THE WITNESS: In reply to your question, Mr. Sadur, the contract of December 17, 1943 provides in Section 2 that now has been admitted in evidence here this morning, "For all inside employees worktime shall begin at the portal and end at the portal."

* * * * * *

1948 BY MR SUSSHOLZ:

* * * * * *

1949 Q. * * * To whom is the notice of termination of the UMW contracts sent if an operator-signatory wishes to terminate it? A. In some instances the termination is sent to the district office and forwarded to us, and in some instances it is forwarded directly to the national office.

Q. And in those instances where it is sent to the district, by that you mean- A. Of the United Mine Workers.

Q. Yes, sir, situated in the respective localities? A. Right.

Q. Where it is sent to the district, is it always the case that you the national office receive notice thereof? A. It never fails.

* * * * * * *

1972 MR. FLANDERS: Mr Examiner, I have a copy of a press release that I neglected to include with my formal exhibits at the begin-
1973 ning of this hearing. It's a press release dated December 17, 1954, issued by the Secretary of Labor, which was the first public announcement that these proceedings would be instituted.

* * * * * * *

1974 MR. SUSSHOLZ: I am willing to stipulate that on December 17, 1954 the Secretary of Labor issued a press release which contained notice of his intention to invoke a proceeding to determine whether he shall make a wage determination in the coal industry.

MR. FLANDERS: That's satisfactory.

PRESIDING OFFICER GRANT: Is that acceptable to the rest of you gentlemen?

(No response.)

PRESIDING OFFICER GRANT. Very well. We will consider it so stipulated.

* * * * * * *

1983 MR. HOPKINS: Mr. Examiner, let it be said for the record that, in behalf of the Mine Workers and all of its representatives and our associates--and I'm sure I speak for all counsel here, no matter what their position may be--that we have found it a genuine personal and professional pleasure to attend a hearing presided over as efficiently and fairly and properly as you have, sir, and I should like to have that in the record, because I know every person here will join me in that.

1984 MR. COHEN: I want to endorse those remarks.

* * * * * * *

No. 704

IN THE

Supreme Court of the United States

October Term, 1957

RUTH ELKHORN COALS, INC., ET AL., *Petitioners*

v.

JAMES P. MITCHELL, Secretary of Labor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WALLACE M. COHEN
of Landis, Cohen, Rubin & Schwartz
1832 Jefferson Place, N. W.
Washington 6, D. C.
Counsel for Petitioners

Of Counsel:

JAMES M. LANDIS
New York City, New York

FRED B. GREEAR
Norton, Virginia

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	3
Statement	3
Reasons for granting the writ	6
Conclusion	15
Appendix A—Opinion and Judgment Below	1a
B—Statutes and Regulations	10a

CITATIONS

CASES:

Addison v. Holley Hill Co., 322 U.S. 607	12
Federal Power Commission v. Colorado Interstate Gas Co., 348 U.S. 492	7
Marshall Field & Co. v. National Labor Relations Board, 318 U.S. 253	8
National Labor Relations Board v. Cheney Lumber Co., 327 U.S. 385	7
Panhandle Eastern Pipeline Co. v. Federal Power Commission, 324 U.S. 635	7
Perkins v. Lukens Steel, 310 U.S. 113	10
Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672	10
Todd v. Securities and Exchange Commission, 137 F. 2d 475	8
Unemployment Commission v. Aragon, 329 U.S. 143	7

STATUTES AND REGULATIONS:

Eight Hour Day Law, 37 Stat. 138 (40 U.S.C. 325)	9, 11
Fair Labor Standards Act, 52 Stat. 1060 (29 U.S.C. 201)	14
Natural Gas Act, 52 Stat. 821 (15 U.S.C. 717)	7

Page

Walsh Healey Act, 49 Stat. 2036 (41 U.S.C. 35-45)

Section 1 ..... 10, 10a
Section 9 ..... 2, 4, 8, 9, 12, 13, 15, 11a
Section 10 ..... 2, 4, 11a
Section 12 ..... 12, 12a

General Regulations under the Walsh-Healey Public Contracts Act, 41 CFR § 201.2(a) (41 USCA Appendix § 201.2(a) (1957 ed.)) 3, 4, 5, 12a

Rulings and Interpretations under the Walsh-Healey Public Contracts Act, No. 3, U.S. Department of Labor, Section 13 ..... 2, 13a

MISCELLANEOUS:

80 Congressional Record 9992-10025 12
80 Congressional Record 9993 13
80 Congressional Record 10009 12
80 Congressional Record 10016 12
98 Congressional Record 6529 15
98 Congressional Record 6531 14
29 Ops. Attorney-General 324 11
29 Ops. Attorney-General 543 11
30 Ops. Attorney-General 24 11
Hearings before a House Subcommittee on the Judiciary on HR 11554, 74th Cong. 2nd. Sess. p. 513 .. 11
S. 3055, 74th Cong. 1st Sess. 9
S. 2594, 82nd Cong. 2nd Sess. 15

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Ruth Elkhorn Coals, Inc., et al. (Petitioners) pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on September 19, 1957.

OPINIONS BELOW

The judgment of the United States District Court for the District of Columbia is unreported and is reprinted in R. 85. The opinion of the Court of Ap-

peals has not yet been reported and is reprinted in Appendix A, *infra*, pp. 1a-7a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1957 (App. A, *infra*, p. 8a). A timely petition for rehearing was denied on October 10, 1957 (Appendix A, *infra*, p. 9a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 10 of the Walsh-Healey Act, 41 U.S.C. 43a .

QUESTION PRESENTED

Whether the Secretary of Labor acting under the Walsh-Healey Act has authority when coal is generally available in the open market to make a wage determination for the bituminous coal industry, in derogation of Section 9 of said Act (41 U.S.C. 43) which reads in pertinent part

> "This Act shall not apply to purchases of such materials, supplies, articles or equipment as may usually be bought in the open market . . . ."

on an interpretation that such exemption applies only to those purchases which the Government is by law permitted to make in the open market.[1]

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[1] As appears hereinafter, *infra*, p. 14, the area of permissible Government procurement in the open market is limited to purchases of two types: (1) purchases without advertising for bids under circumstances bringing the purchase within the exception to the General Purchase Statute, R.S. 3709, that is, where the public exigency requires immediate delivery of the goods; and (2) purchases of goods which the procurement agency is authorized by the express language of a statute to buy "in the open market". Section 13, Rulings and Interpretations under Walsh-Healey Public Contracts Act, No. 3, Department of Labor, Appendix B, *infra*, p. 13a.

STATUTE INVOLVED

The pertinent provisions of the Walsh-Healey Act, 49 Stat. 2036 et seq., 41 U.S.C. 35-45, and the General Regulations under the Walsh-Healey Public Contracts Act, 41 CFR § 201.2a; 41 USCA Appendix, § 201.2a (1958 Ed.), are set out in Appendix B, *infra,* pp. 10a-14a.

STATEMENT

By letter dated December 15, 1954, United Mine Workers of America, Pittsburgh Consolidation Coal Company, and Pocahontas Fuel Company, Inc., requested the Secretary of Labor to make a wage determination for the bituminous coal industry under the Walsh-Healey Act (R. 1). By notice dated December 30, 1954, the Acting Secretary of Labor gave notice that a public hearing would be held on February 1, 1955, before a hearing examiner to make such a wage determination (R. 2-4). Petitioners here representing some 305 bituminous coal operators in Virginia, West Virginia and Kentucky opposed the proposed $2.245 per hour minimum wage determination (R. 5-9). Among other contentions, these Petitioners asserted from the very beginning and offered to prove that the Secretary of Labor had no jurisdiction to fix a minimum wage applicable to the bituminous coal industry because coal is generally bought in the open market and therefore came within the "open-market" exemption of the statute (R. 86 ff). The Hearing Examiner refused to receive testimony or argument as to whether coal can be purchased in the open market. He did not consider this matter properly raised in this proceeding inasmuch as the Depart-

ment of Labor by regulation[2] had interpreted the "open market" exemption of the statute to apply only to those articles which the contracting officer for the Government is expressly authorized to purchase in the open market (R. 96-99). The Secretary therefore upheld the exclusion by the Hearing Examiner of any testimony or argument on applicability of the "open market" exemption to coal (R. 11).

Pursuant to Section 10 of the Walsh-Healey Act (41 U.S.C. 43a), Petitioners herein seasonably filed a complaint for injunctive relief against the Secretary of Labor in the United States District Court for the District of Columbia (R. 60-75), alleging, *inter alia,* that the wage determination was beyond the statutory authority of the Secretary of Labor because of the "open market" exemption, despite the Secretary's refusal to consider this issue (R. 64). In his answer to said complaint (R. 79-85), the Secretary stated: "Defendant [Secretary] denies that he determined that bituminous coal may not usually be bought in the open market, and further denies that he determined whether it is or is not exempt under Section 9 of the Walsh-Healey Public Contracts Act. He alleges that he ruled that the 'open market' exemption was a matter not properly raised at the administrative hearing. . . ." (R. 79). And again in said answer, the Secretary "admits that he has refused to consider, and has ruled that there cannot be raised in this proceeding, the plaintiffs' contention that bituminous coal is a commodity 'that may usually be bought in the open market' and is exempt therefore from the coverage of the Act" (R. 81).

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[2] Section 201.2a, General Regulations under the Walsh-Healey Public Contracts Act, 41 CFR § 201.2a; 41 USCA Appendix, § 201.2a (1957 Ed.), Appendix B, *infra,* p. 12a.

A preliminary injunction was granted. On the Secretary's motion to dissolve the preliminary injunction and for summary judgment, the District Court granted the Secretary's motion and upheld the Secretary's wage determination without any findings of fact or rulings of law (R. 85).

On appeal, the court below affirmed the District Court, holding that though the Secretary erred in ruling that the "open market" exemption issue could not be raised by Petitioners in the administrative proceeding, nevertheless as a matter of statutory interpretation, the "open market" provision did not exempt the bituminous coal industry from the Act. The court below did not expressly uphold the validity of the Regulation as such, but dealt solely with the question as one of statutory interpretation. It considered as important the "fact that since 1936 the exemption has been consistently interpreted and applied by the Secretary . . . to include only supplies purchased by the United States where the contracting officer is authorized by express language in a statute to purchase in the open market, or where the purchase is made without advertising for bids under circumstances bringing it within the exceptions to the General Purchase Statute, Rev. Stat. § 3709, as amended, 41 U.S.C. § 5 (1942), for example, when immediate delivery is required by public exigency" (App. A, *infra*, p. 5a).[3]

[3] This is a paraphrase of Section 201.2a, General Regulations under the Walsh-Healey Public Contracts Act, Appendix B, *infra*, p. 12a.

REASONS FOR GRANTING THE WRIT

There are three important reasons for granting the writ in this case.

1. The decision below raises a fundamental and important question of procedure in the relationship of the citizen and his government, and of the administrative agency and the reviewing court. In a situation in which the court decides that an issue raised by your Petitioners from the very first was improperly excluded from the administrative hearing and that Petitioner was entitled to present his case on this issue to the Hearing Examiner and the agency, is it appropriate for the reviewing court to decide that such presentation, despite the conceded erroneous denial of the right to make it—would have been fruitless, and to proceed to make a determination of the substantive issue?

2. The substantive determination on the "open market" exemption is an erroneous interpretation of an important Federal law. The court below conceded that, considering the language of the exemption alone, it can "arguably be construed to mean that if bituminous coal can be bought generally in the open market then the industry as such is exempt from the Act" (App. A, *infra*, p. 4a).

3. The scope of the "open market" exemption, which is the basic substantive determination contained in the opinion and decision below, is a matter of broad national interest. The language of the statute, in the opinion of your Petitioners, clearly means that an industry which produces materials which can be and ordinarily are purchased in the open market by ordinary purchasers is exempt from Walsh-Healey Act wage determinations. The difference between this

interpretation of the Walsh-Healey Act and that of the Secretary and the Court below is of momentous importance to a wide sector of American business and to very important Government purchasing operations. It is not an issue which has previously been determined by this Court. It is basic to administration of the Walsh-Healey Act.

Considering these reasons in order:

1. In limine, there is the question of the relationship of the reviewing court vis-a-vis the agency, where the court below proceeded to give its interpretation of the "open market" statutory exemption in the absence of a definite ruling thereon by the Secretary. The Secretary consistently ruled that the issue was premature. *Supra,* p. 4. The salutary rule[4] that the agency should make the determination in the first instance applies to questions of law as well as issues of fact. In *Panhandle Eastern Pipeline Company* v. *Federal Power Commission,* 324 U.S. 635 at 649, the question which had not been raised in the application for rehearing concerned the exemption under Section 1(b) of the Natural Gas Act (52 Stat. 821; 15 U.S.C. 717)

[4] In the ordinary instance, the objection is raised by one of the parties for the first time before the court on review and not before the agency. In such a situation this Court has consistently refused to permit the reviewing court to decide the issue *de novo. National Labor Relations Board* v. *Cheney Lumber Company,* 327 U.S. 385; *Unemployment Commission* v. *Aragon,* 329 U.S. 143, 155. The same rationale is applicable where the reviewing court attempts to decide an issue sua sponte. *Federal Power Commission* v. *Colorado Interstate Gas Company,* 348 U.S. 492. These cases, as well as the point being made here (where the issue is raised before the agency but the agency refuses to rule) merely reflect different facets of the settled principle that courts are precluded from passing on issues which have not been considered by the administrative body.

of a pipeline company's production and gathering facilities. See also *Marshall Field & Company* v. *National Labor Relations Board,* 318 U.S. 253, 255-256; *Todd* v. *Securities and Exchange Commission,* 137 F. 2d 475, 478 (C.A. 6).

2. Although the Secretary dealt with this issue in terms of a refusal to decide, it may be assumed that the practical effect of the wage determination here was to decide that the "open market" exemption of Section 9 of the Act is unavailing to these Petitioners. The court below on the other hand considered the issue "as one of statutory interpretation." As the court below stated: "We reach our result independently of the factual allegations made by appellants. We do not understand appellants to contend now that an administrative hearing upon the applicability of the exemption is required as a condition to our disposition of the question." (App. A, *infra,* p. 3a). Not only was an offer of proof made that coal is an article which can usually be bought in the open market (R. 96-99), but it appears the court below assumed this fact for purposes of its decision. The court below then proceeded to construe the "open market" exemption contrary to the plain language of the statute.

(a) The court below referred to the presence of three explicit exemptions in Section 9 of the Act—(1) perishables including dairy and livestock, (2) agricultural and farm products processed for first sale by the original producers, (3) any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof—as indicating that Congress did not intend the "open market" exemption itself to have the meaning which these plain words import because the court concluded these articles (perish-

ables and agricultural products) are available for purchase in the open market. The inclusion of these specific exemptions does not justify limitation of the "open market" exemption. When the Walsh-Healey Act was introduced as S. 3055, 74th Cong., 1st Session (1935), it contained no exemption for purchases made in the open market. The only exemption was for "agricultural or farm products processed for first sale by the original producer . . .". And, as we shall show, *infra*, p. 11, the "open market" exemption was similar to a provision in the forty-year-old Eight Hour Day Law (37 Stat. 138 (1912), 40 U.S C. 325) which had uniformly been given the construction contended for by Petitioners here. Further, there is nothing in the legislative history of Section 9 which gives the slightest indication that the "perishables and agricultural products" exemptions were intended to limit the "open market" exemption. The "open market" exemption and the other exemptions (perishables and agricultural products) are each sui generis. The "perishables and agricultural products" exemption is available whether these products are available in the open market or not and whether purchased by the Government by bid or not. The Secretary has applied the "open market" exemption in Section 9 of the Act depending on how the Government purchases the articles, whereas the "perishables" exemption depends on the type of article, regardless of the manner of Government purchase. Yet each exemption applies to a class of articles and not to the manner of purchase.

Likewise, the opinion below relies upon a non-sequitur in finding a Congressional intent to limit the "open market" exemption because Government contracts for materials and supplies must be made with the manu-

facturer of or a regular dealer in the materials and supplies. Section 1(a) of the Act, 41 U.S.C. § 35 (a). This provision merely describes the persons who are entitled to contract with the Government, and not the materials and supplies covered by the exemption. A "regular dealer" can be one who deals regularly in goods not usually obtainable in the open market. If coal is exempt under Section 9, there is no point in determining who is a "regular dealer" in coal. The mere fact that coal may be handled by a "regular dealer" does not establish that coal is not exempt. Again, there is not one iota of legislative history showing that Congress intended Section 1 (a) to limit the "open market" exemption. And as we shall show, the legislative history is clear to the contrary.

(b) The court below relied on the fact that since 1936 the exemption has been consistently interpreted and applied by the Secretary to include only those purchases which the Government is authorized to make in the open market. This is a "bootstrap" argument. For it was not until the Fulbright Amendment, §66 Stat. 308 (1952), 41 U.S.C. 43a(b), Appendix B, *infra*, p. 11a, that review was permitted of the "applicability" of the Act. *Perkins* v. *Lukens Steel*, 310 U.S. 113 (1940) held that private parties had no standing to obtain such review; so that until 1952, the Secretary's interpretation was immune from attack. And in a somewhat similar situation where the argument was made that the agency had consistently interpreted the jurisdictional clause of a statute in a certain manner, this Court gave the ready answer that ". . . consistent error is still error".[5]

[5] *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, 678, fn. 5.

(c) In contradistinction to the tenuous support in extraneous matters for the strained interpretation relied upon by the court below, the legislative history dealing directly with the "open market" exemption is unambiguous that Congress intended the language to be given the plain meaning contended for by Petitioners here. Almost identical language appears in the prototype of Walsh-Healey—the forty-year-old Eight Hour Day Law:

> "Nothing in section 324 of this title shall apply to contracts . . . for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not." (37 Stat. 138 (1912), 40 U.S.C. 325)

There is no dispute that by the time Walsh-Healey was introduced, the same language in the Eight Hour Day Law was construed to exempt articles which were standard in nature. 29 Ops. Attorney-General 324; 29 Ops. Attorney-General 543-45 (1912); 30 Ops. Attorney-General 24 (1913).[6] Moreover, this exemption in the Eight Hour Day Law was discussed during hearings on Walsh-Healey.[7]

The Congressional debate clearly shows that the legislators were dealing solely with the plain meaning

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[6] In referring to this unimpeachable fact, the court below stated:

> "We do not overlook competing considerations, including the relationship of the open market language to similar language in the earlier Eight-Hour Law, 37 Stat. 138 (1912), 40 U.S.C. § 325 (1952), which caused the latter to be given a narrower interpretation than we accord the present Act." App. A, *infra*, pp. 6a-7a.

[7] Hearings before a House Subcommittee on the Judiciary on H.R. 11554, 74th Cong., 2d Session 513 (1936).

of the language, and nowhere does it appear that any suggestion was made that the exemption was limited to those articles which the Government was authorized to purchase in the open market.[8] Mr. Celler, one of the proponents of the bill, took emphatic exception to the argument that "commonplace articles"—citing as examples, "ink and the paper and the linoleum and the seats and the seat tacks and what not in this very chamber"—would be subject to the Act, stating that these "very articles . . . could and would be purchased in the open market", citing the express language of Section 9 (80 Cong. Rec. 10,009). The proponent of the bill, Congressman Healey, found nothing ambiguous in the language of Section 9. He stated: (80 Cong. Rec. 10,016)

> "Mr. Chairman, in reference to the carpet on the floor and the tacks and various other articles of furniture which were pointed out so dramatically by the gentleman from New York (Mr. Wadsworth), I call attention to the language of the bill, which is *absolutely clear and understandable* the provisions of this bill 'shall not apply to articles that may usually be bought in the open market'." (Emphasis supplied)[9]

Earlier in the debate, in answer to a question by Congressman Clark of North Carolina whether Section

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[8] 80 Cong. Rec. 9992-10,025.

[9] If Congress intended to exempt only those articles purchased without competitive bidding, it knew how to do so. By the express terms of Section 12 of the Act (41 U.S.C. 45), the Act is "to apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936 . . .". App. B, *infra*, p. 12a. cf *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 614, 618.

9 exempted "things like manufactured lumber, cotton, furniture", Congressman Healey answered:

> "I call the gentleman's attention to the language of Section 9, the first sentence of which reads [quoting the open market exemption of Section 9]. I think this language is *very clear;* and in my judgment do not think it would cover the articles the gentleman has in mind." (Emphasis supplied). 80 Cong. Rec. 9993.[10]

3. Although the legislative history and the plain meaning of the language in Section 9 can leave no room for doubt that the Secretary and the court below have erroneously interpreted said section, at the very least, the court below recognized that there was a "deal of ambiguity in congressional discussions". App. A, *infra,* p. 6a. Since this ambiguity concerns the basic question whether the jurisdiction of the Secretary under the Act is to extend to all industry or is to be restricted as the Congress intended, this question is of national import.[11] By giving the exemption a construction which makes it applicable only to those purchases which the Government is authorized to make in the open market, the court below has rewritten the statute and in effect has deprived the exemption of its intended content. The result of this interpretation is

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[10] The colloquy which follows indicates quite clearly that Congressman Healey was speaking in terms of the coverage of the Act under the exemption, and not that articles of general use would not be exempted under the exemption. 80 Cong. Rec. 9993.

[11] With the vast extent of Government operations and procurement of materials, almost the entire national economy is subject to Walsh-Healey. Moreover, in coal mining, the producer or operator can never be sure that some of his coal may not be purchased by the Government, since coal is usually sold through dealers.

to make the Act applicable to all industry generally, despite the clear intent of Congress that the Act should have only limited application.[12] It is not open to question that the purchases which Government agents are authorized to make in the open market without advertising for bids are exceptional and only cover situations where immediate delivery is required by the public exigency.

The simple and undeniable fact is that Congress did not intend to blanket all industry within the frame of Walsh-Healey, as the Secretary's interpretation would do. Walsh-Healey is not a substitute for and rests on different considerations than the Fair Labor Standards Act, 52 Stat. 1060, 29 U.S.C. 201, where Congress dealt with the problem of minimum uniform wage standards for industry generally.

Since a suit to test the applicability of the Act can be brought against the Secretary of Labor only in the District of Columbia Circuit, no conflict exists with other circuits. However, the basic purpose of the Fulbright Amendment in 1952 was to afford judicial review of the very question in issue here—the "open market" exemption. It was the sponsor's conviction that the limited manner in which the Secretary construed the exemption was so clearly "contrary to the legislative intent that the courts cannot help but interpret it in the proper manner . . .". 98 Cong. Rec. 6531

[12] The Secretary, in his brief to the court below, conceded that the narrow interpretation evidenced by Regulation 201.2(a), *supra*, is "applicable generally *to all industries* subject to the Act" and "has sufficed for application *to all industries* . . ." (emphasis supplied). Brief for Appellee, No. 13569, C.A.D.C. pp. 10-11.

(1952).[13] Your Petitioners suggest that the Fulbright Amendment recognizes that this issue is of sufficient national importance warranting judicial review. In these circumstances, this Court should settle the applicability of this statute so important to the economy of the country.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WALLACE M. COHEN
of Landis, Cohen, Rubin & Schwartz
1832 Jefferson Place, N. W.
Washington 6, D. C.
Counsel for Petitioners

Of Counsel:
JAMES M. LANDIS
New York City, New York

FRED B. GREEAR
Norton, Virginia

January, 1958

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[13] The Fulbright Amendment, S. 2594, 82nd Cong., 2d Session (1952), originally amended Section 9 to make it abundantly clear that the "open market" exemption would apply "regardless of the method of procurement used by the government". Because opposition to the entire amendment developed, it was agreed that the major objective of affording judicial review would enable the courts to determine the correctness of the Secretary's narrow interpretation of Section 9 (98 Cong. Rec. 6529).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,569

RUTH ELKHORN COALS, INC., et al., *Appellants*

v.

JAMES P. MITCHELL, Secretary of Labor, *Appellee*

Appeal from the United States District Court for the District of Columbia

Decided September 19, 1957

* * * * * * * * * * *

Before PRETTYMAN, FAHY and DANAHER, *Circuit Judges.*

FAHY, *Circuit Judge:* Appellants constitute part of the bituminous coal industry. They filed suit in the District Court against the Secretary of Labor, appellee, seeking invalidation of a determination by the Secretary, made under the Walsh-Healey Public Contracts Act,[1] of prevailing minimum wages in the industry. The effect of the determination considered with the Act is to require appellants, in any contract they might make with the Government to supply coal in an amount exceeding $10,000, to stipulate to pay not less than the determined minimum wages to persons appellants employ in furnishing the coal. The District Court granted the Secretary's motion for summary judgment and affirmed his determination of the prevailing minimum wages.[2]

The principal contention of appellants is that the Walsh-Healey Act does not apply at all to the bituminous coal

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[1] 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 35 (1952).

[2] The purposes and plan of the Walsh-Healey Act have recently been described by this Court in *Mitchell* v. *Covington Mills, Inc.*, 97 U.S. App. D.C. 165, 229 F. 2d 506, and need not now be repeated in more detail than is contained in the foregoing paragraph of the opinion.

industry. They rely upon the provision of the Act that it "shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market . . . ," 41 U.S.C. § 43 (1952), an exclusion which appellants urge includes bituminous coal. They raised this point in the administrative proceedings, where the Secretary ruled that it was premature. They renewed the contention before the District Court and press it here, asserting that they may obtain our review of the question under the Fulbright Amendment. Section 10(b) of the Act, 41 U.S.C. § 43(b) (1952), a part of that Amendment, provides:

> Review of any such wage determination, or of the applicability of any such wage determination, may be had . . . in the manner provided in section 1009 of Title 5 by any person adversely affected or aggrieved thereby, who shall be deemed to be any manufacturer of, or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

Notwithstanding this language, the Secretary urges that the question about the open market exemption is not reviewable in these proceedings. He says that the open market provision is concerned with the applicability of the wage determination, which according to its terms applies only to contracts subject to the provisions of the Act, from which it follows that any question as to the scope of the exemption can be raised only by way of defense in a contract enforcement action as permitted by section 10(c), 41 U.S.C. § 43(c) (1952). Under section 10(c) the applicability of the exemption to a particular contract may be judicially reviewed, notwithstanding the contract contains the stipulation required by the Act for payment of the minimum wages. *Mitchell* v. *Covington Mills, Inc., supra,* is cited as holding that only in this manner may the applicability of the exemption be judicially considered. But we think the case does not so hold, for we there pointed out

that "the complaints in these suits do not ask the court to determine"[3] whether the open market provision takes the bituminous coal industry as such entirely out of the operations of the Act, the very question now presented.

In our view the question thus stated may be judicially reviewed in these proceedings under section 10(b). Appellants are regular dealers in supplies of the bituminous coal industry. The wage determination is purportedly applicable to that industry. The "applicability of . . . such wage determination," as well as the wage determination itself, is sought to be reviewed. Supplies of bituminous coal are among those purchased or to be purchased by the United States. Appellants thus by the very terms of section 10(b) are persons adversely affected or aggrieved, and as such are given by that section the right to obtain judicial review of the wage determination and its applicability, even though they have not entered into a contract with the Government to supply bituminous coal. While judicial review of these questions is also available in an appropriate case under section 10(c), *Mitchell* v. *Covington Mills, Inc., supra,* n. 4, this does not preempt the right of review available under section 10(b). The plain language of the latter applies to appellants in the circumstances before the Court, the language is consistent with the purpose and intent of the Amendment of which the language is a part, and it should be given its plain meaning.

On the merits, however, we think the appeal must fail. We are unable to agree that the open market provision exempts bituminous coal from the Act,[4] or that error other-

[3] 97 U.S. App. D.C. at 168, 229 F. 2d at 509.

[4] Although in the administrative proceeding this question was not considered because deemed premature it need not now be remanded to the Secretary. The question is one of statutory interpretation. We reach our result independently of the factual allegations made by appellant. We do not understand appellants to contend now that an administrative hearing upon the applicability of the exemption is required as a condition to our disposition of the question.

wise impairs the validity of the Secretary's determination or the District Court's judgment.

As to the open market exemption: Appellant's contend it exempts this industry because bituminous coal is mined for general use and may be bought by the Government in normal competitive channels. Under this theory the Act would apply only to such things as were required by the Government to be made to order on its specifications. The Secretary, on the other hand, interprets the exemption to exclude from the coverage of the Act only purchases the Government itself is authorized to make in the open market.

The language of the exemption, considered alone, can arguably be construed to mean that if bituminous coal can be bought generally in the open market then the industry as such is exempt from the Act; but this language must be interpreted in the context of the whole statute, and with its purpose in mind. The Secretary calls attention to several passages in the statute which support his narrow interpretation of the exemption. For example, section 9 of the Act, 41 U.S.C. § 43 (1952), explicitly exempts "perishables, including dairy and livestock and nursery products." These are available for purchase in the open market. They need not have been singled out for exemption if open market availability was enough to exempt them. Explicitly exempted also are "agricultural and farm products processed for first sale by the original producers." The statute covers such products when subsequently processed, though they are available in the open market. Another instance is the explicit exemption of "any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof." This would be superfluous were the statute inapplicable to products generally available in the open market. These explicit exclusions indicate that Congress did not intend the open market exemption itself to exclude supplies simply because they were available generally in the open market. The same indication inheres in the requirement of section 1(a), 41

U.S.C. § 35(a) (1952), that a contractor with the Government must be either the manufacturer of or a "regular dealer" in the supplies purchased; for a "regular dealer" is one who deals in goods which ordinarily are saleable in the open market.

With the foregoing we must also consider the basic purpose of the Act. As set forth in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507, and as repeated in our recent *Covington Mills* decision, this basic purpose is "to use the leverage of the Government's immense purchasing power to raise labor standards," and to do this on a scale which could hardly be possible under the narrow scope which would be accorded to the Act under appellants' broad interpretation of the exemption. Important also is the fact that since 1936 the exemption has been consistently interpreted and applied by the Secretary, as administrator of its provisions, to include only supplies purchased by the United States where the contracting officer is authorized by express language in a statute to purchase in the open market, or where the purchase is made without advertising for bids under circumstances bringing it within the exceptions to the General Purchase Statute, Rev. Stat. § 3709, as amended, 41 U.S.C. § 5 (1952), for example, when immediate delivery is required by public exigency.

When Congress was considering the first appropriation of funds for administering the Act inquiry was made of the Comptroller General whether the administrative interpretation or one which would give broad scope to the open market exemption as now claimed by appellants should be accepted. H. R. Rep. No. 433, 75th Cong., 1st Sess. 25. The Acting Comptroller General responded:

> To permit such exemptions under the present act, which relates only to supply contracts, would so restrict its operation as practically to nullify its other provisions. Consequently, as between that interpretation and the one adopted by the Secretary of Labor, I felt compelled to accept the latter—the plain terms

> of the provision being such as to admit of only one or the other of those two interpretations.
>
> Accordingly I have to advise that unless and until the matter be clarified by further legislation, I am constrained to concur in the interpretation placed on the provision by the Department of Labor.[5]

81 Cong. Rec. 2771. The Secretary's interpretation, brought thus forcibly to congressional attention, has persisted throughout the administration of the Act and has been the basis upon which appropriations have been made.

Considering the foregoing, and notwithstanding a deal of ambiguity in congressional discussions, we are impelled to resolve doubts against the interpretation sought by appellants. *United States* v. *Korpan*, 354 U.S. 271; *Baltimore & O. R. Co.* v. *Jackson*, 353 U.S. 325. See also *Brooks* v. *Dewar*, 313 U.S. 354. Otherwise there would be more to repudiate than to accept in the mass of historical, legislative, and administrative material bearing on the problem. We do not overlook competing consider-

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[5] The appropriations bill as reported by the House Appropriations Committee provided $265,000 for the Division of Public Contracts, which would administer the Walsh-Healey Act. This was considerably less than the amount requested. Chairman McMillan of the Committee reported that the lower figure was "a result of the doubt that the committee entertained as to the question of the purchase of goods in the open market." After the receipt of the Acting Comptroller General's opinion quoted above, Chairman McMillan moved to amend the appropriations bill to provide a higher figure for the administration of the Act. He stated that he did this because "the effect of . . . [the Comptroller General's] decision is to considerably expand the activities of this division over what would have been required had the interpretation favored by our subcommittee been placed on the law. In the light of these facts, I am moving to restore the amount that the committee cut from the estimates for the Division of Public Contracts." 81 Cong. Rec. 2770. The narrow interpretation of the open market exemption was approved by Congressman Healey, sponsor of the Act. 81 Cong. Rec. 2771-72. The Amendment was adopted by the House of Representatives, 81 Cong. Rec. 2773, and became law, 50 Stat. 299 (1937).

ations, including the relationship of the open market language to similar language in the earlier Eight-Hour Law, 37 Stat. 138 (1912), 40 U.S.C. § 325 (1952), which caused the latter to be given a narrower interpretation than we accord the present Act. But in all the circumstances of language, purpose and history the authority of the Secretary to make a determination of the prevailing minimum wages for the bituminous coal industry must be upheld.

The foregoing disposes of the principal contentions of appellants. We have considered, however, their other contentions, concerned with the sufficiency and competence of the evidence, the selection of production districts, and the correctness of different wages for districts covered by the determination, including the alleged inclusion therein of factors for which employers cannot be held liable because of the Portal-to-Portal Act, 61 Stat. 84 (1947), 29 U.S.C. § 251 (1952). We find among these contentions no basis for reversing the summary judgment granted by Judge Letts in favor of the Secretary.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957.

C. A. 5052-55

No. 13,569

RUTH ELKHORN COALS, INC., ET AL., *Appellants,*

v.

JAMES P. MITCHELL, Secretary of Labor, *Appellee.*

United States Court of Appeals
for the
District of Columbia Circuit
Filed Sept. 19, 1957
Joseph W. Stewart, Clerk

Appeal from the United States District Court for the District of Columbia.

Before: Prettyman, Fahy and Danaher, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: September 19, 1957.

Per Circuit Judge Fahy.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term, 1957

No. 13,569

RUTH ELKHORN COALS, INC., ET AL., *Appellants*,

v.

JAMES P. MITCHELL, *Appellee*.

United States Court of Appeals
for the
District of Columbia Circuit
Filed Oct. 10, 1957
Joseph W. Stewart, Clerk

Before: Prettyman, Fahy and Danaher, Circuit Judges, in Chambers.

Order

Upon consideration of appellants' petition for rehearing, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: October 10, 1957

APPENDIX B

Walsh-Healey Public Contracts Act, as Amended. 49 Stat. 2036, 41 U.S.C. 35-45

SECTION 1. In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

* * * * * * * * * *

SECTION 2. Any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 35 of this title shall render the party responsible therefor liable to the United States of America for liquidated damages * * *; and, in addition, the agency of the United States entering into such contract shall

have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. * * *

SECTION 4. The Secretary of Labor is authorized and directed to administer the provisions of sections 35-45 of this title and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of said sections and to prescribe rules and regulations with respect thereto. * * * The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as provided in sections 35-45 of this title, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of sections 35-45 of this title. * * *

SECTION 9. Sections 35-45 of this title shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall they apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. * * *

SECTION 10(b). All wage determinations under section 35(b) of this title shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicability of any such wage determination, may be had within ninety days after such determination is made in the manner provided in section 1009 of Title 5 by any person adversely affected or aggrieved thereby, who shall be deemed to include any manufacturer of, or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by

the Government from any source, who is in any industry to which such wages determination is applicable.

SECTION 10(c). Notwithstanding the inclusion of any stipulations required by any provision of sections 35-45 of this title in any contract subject to said sections, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms "locality", "regular dealers", "manufacturer", and "open market". * * *

SECTION 12. Sections 35-45 of this title shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936.

General Regulations Under the Walsh-Healey Public Contracts Act

SECTION 201.2 (Statutory Exemptions).—Inclusion of the stipulations enumerated in Sec. 201.1 is not required in the following instances:

(a) Where the contracting officer is authorized by the express language of a statute to purchase "in the open market," or where a purchase of articles, supplies, materials or equipment, either in being or virtually so, is made without advertising for bids under circumstances bringing such purchase within the exception to the General Purchase Statute, R.S. 3709, that is, where immediate delivery is required by the public exigency.

(b) Where the contract relates to perishables, including dairy, livestock, and nursery products ("perishables" cover products subject to decay or spoilage and not products canned, slated, smoked, or otherwise preserved);

(c) Where the contract relates to agricultural or farm products processed for first sale by the original producers;

(d) Whether the contract is by the Secretary of Agriculture for the purchase of Agricultural commodities or the products thereof;

* * * * * * * * * * *

UNITED STATES DEPARTMENT OF LABOR

PUBLIC CONTRACTS DIVISION

Rulings and Interpretations No. 3
(Rev. 1953)

SECTION 13. Open-Market Purchases.

(a) The Public Contracts Act does "not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market." The Act, section 9.

(b) The stipulations set forth in the Act and section 201.1 of the Regulations need not be included in the contract "where the contracting officer is authorized by the express language of a statute to purchase 'in the open market,' or where a purchase of articles, supplies, materials, or equipment, either in being or virtually so, is made without advertising for bids under circumstances bringing such purchase within the exception to the General Purchase Statute, R.S. 3709, that is, where immediate delivery is required by the public exigency." — Regulations, section 201.2(a).

(c) Open-market purchases in a general sense include purchases made at places where the particular articles are bought and sold in the manner in which purchases are ordinarily made between individuals, that is, without advertising for bids. However, the open-market purchase exemption in the Public Contracts Act (sec. 9) by its terms applies only to such purchases as the Government usually makes in the open market.

(d) The usual method of open-market procurement by the Government includes purchases of two types: (1) purchases without advertising for bids under circumstances bringing the purchase within the exception to the General Purchase Statute, R.S. 3709, that is, where the public

exigency requires immediate delivery of the goods; and (2) purchases of goods which the procurement agency is authorized by the express language of a statute to buy "in the open market." Therefore, section 9 of the Public Contracts Act exempts only purchases of the above two types. The mere fact that the procurement agency is authorized to buy "without regard to the provisions of R.S. 3709" is not controlling.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	17

CITATIONS

Cases:

Alabama Mills, Inc. v. *Mitchell*, 244 F. 2d 21, certiorari denied, 355 U. S. 834	13
Alstate Construction Company v. *Durkin*, 345 U. S. 13	7, 8
Brooks v. *Dewar*, 313 U. S. 354	7
Covington Mills et al. v. *Mitchell*, 229 F. 2d 506, certiorari denied, 350 U. S. 1002	13
Endicott Johnson Corp. v. *Perkins*, 317 U. S. 501	11
Lance v. *United States*, 190 F. 2d 204, certiorari denied, 342 U. S. 896, rehearing denied, 342 U. S. 915	12
Maneja v. *Waialua Agricultural Co.*, 349 U. S. 254	7
Perkins v. *Lukens Steel Co.* 310 U. S. 113	8, 11
Ready-Mix Concrete v. *United States*, 130 F. Supp. 390	12
Ready-Mix Concrete Co., Ltd. v. *United States*, C. Cls. No. 49279, decided January 15, 1958	12
Reynolds Corp. v. *Morse*, 174 F. 2d 159	12
Thrift Packing Co., In re, 100 F. Supp. 907	12
Unexcelled Chemical Corp. v. *United States*, 345 U. S. 59	12
United States v. *American Trucking Assns.*, 310 U. S. 534	7
United States v. *B. & W. Sportswear*, 53 F. Supp. 785	12
United States v. *Craddock-Terry Shoe Corp.*, 178 F. 2d 760	11
United States v. *Davis, d/b/a Textile Products Industries*, 9 WH Cases 340	12
United States v. *Duro-Wear Shirt Co.*, 22 Labor Cases Para. 67,224	12

Cases—Continued Page

United States v. *Garfunkel Makers*, 199 F. 2d 759 ... 12
United States v. *Harp*, 173 F. 2d 761, certiorari denied, 338 U. S. 816 ... 11
United States v. *Hedstrom*, 8 WH Cases 302 ... 12
United States v. *Hudgins-Dize Co.*, 83 F. Supp. 593 ... 11
United States v. *Lovknit Mfg. Co.*, 189 F. 2d 454, certiorari denied, 342 U. S. 896, rehearing denied, 342 U. S. 915 ... 11
United States v. *Negri, d/b/a General Dairy Products Co.*, 22 Labor Cases Para. 67,297 ... 12
United States v. *Old Dominion Mfg. Co.*, 8 WH Cases 616 ... 12
United States v. *Ozmer*, 181 F. 2d 508 ... 11
United States v. *Rippetoe*, 17 Labor Cases, Para. 65,324 ... 12
United States v. *Smoler Bros.*, 187 F. 2d 29 ... 11
United States v. *Standard Ice Co.*, 18 Labor Cases Para. 65,798 ... 12
United States v. *Standard Pharmical Co.*, 17 Labor Cases Para. 65,460 ... 12
United States v. *Sweet Briar, Inc.*, 92 F. Supp. 777 ... 11
United States v. *United Distillers Products Corp.*, 156 F. 2d 872 ... 12
United States v. *Warsaw Elevator Co.*, 213 F. 2d 517 ... 12
United States v. *W. H. Kistler Co.*, 200 F. 2d 805 ... 12

Statutes:

50 Stat. 299 ... 10
Walsh-Healey Act, 49 Stat. 2036, 41 U. S. C. 35, *et seq* ... 2, 6, 8, 10
Sec. 9 ... 2, 3, 4, 13, 16
Walsh-Healey Act, Fulbright Amendment, 41 U. S. C. 43 (a), 66 Stat. 308 ... 2, 4, 5, 13, 14
Sec. 10 (b) ... 2, 4
Sec. 10 (c) ... 14

Miscellaneous:

Annual Report of the Secretary of Labor (Fiscal Year Ended June 30):
1936, p. 6 ... 12
1937, pp. 34–40 ... 12

Miscellaneous—Continued
Annual Report of the Secretary of Labor (Fiscal Year Ended June 30)—Continued

	Page
1938:	
p. 2	12–13
pp. 46–53	13
1939:	
p. 6	13
pp. 35–44	13
1940:	
p. 5	13
pp. 32–49	13
1941:	
pp. 13–14	13
pp. 27–51	13
1942, pp. 34–37	13
1943, pp. 36–43	13
1944, pp. 61–71	13
1945, pp. 8–13	13
1946, pp. 177–196	13
1947, pp. 96–104	13
1948, pp. 85–92	13
1949, pp. 86–96	13
1950:	
pp. 48–56	13
pp. 193–318	13
1951, pp. 134–135	13
1952:	
pp. 16–18	13
pp. 103–104	13
1953, pp. 81–82	13
1954:	
p. 25	13
pp. 29–30	13
81 Cong. Rec. 2770	10
81 Cong. Rec. 2771	9, 10
81 Cong. Rec. 2772	10
81 Cong. Rec. 2773	10
98 Cong. Rec. 6529	14
98 Cong. Rec. 6530	14

Miscellaneous—Continued

Annual Report of the Secretary of Labor (Fiscal Year Ended June 30)—Continued

	Page
General Regulations under the Walsh-Healey Public Contracts Act, Sec. 201.2 (a), 41 CFR 201.2 (a)	3
Hearings on Defense Production Act Amendments of 1952 before the Senate Committee on Banking and Currency on S. 2594 and S. 2645, Part 5, p. 2473	13
H. Rept. No. 433, 75th Cong., 1st Sess., p. 25	8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 704

RUTH ELKHORN COALS, INC., ET AL., PETITIONERS

v.

JAMES P. MITCHELL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the District Court is unreported and is reprinted at R. 85. The opinion of the Court of Appeals (Pet. App. 1a–7a) is reported in 248 F. 2d 635.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1957 (Pet. App. 8a). A petition for rehearing, timely filed, was denied on October 10, 1957 (Pet. App. 9a). The petition for a writ of certiorari was filed on January 3, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the "open market" exemption of Section 9 of the Walsh-Healey Act—considered in the context of the Act as a whole, the basic statutory purposes, and the consistent administrative and Congressional interpretation—extends beyond purchases of such goods as may usually be bought *by the Government* in the open market pursuant to specific statutory authorization.

STATEMENT

This action was brought under the authority of the Fulbright Amendment to the Walsh-Healey Act,[1] which requires that wage determinations "be made on the record after opportunity for a hearing" and authorizes judicial review of "any such wage determination, or of the applicability of any such wage determination" (Section 10 (b), 41 U. S. C. 43a, subsection (b), Pet. App. 11a). On January 1, 1955, the Secretary of Labor duly issued a notice of a public hearing to determine prevailing minimum wages in the bituminous coal industry (R. 2). It began as scheduled on February 1. At the beginning of the hearing, petitioners questioned the jurisdiction of the Secretary to make a wage determination for the bituminous coal industry on the ground that the Walsh-Healey Act was inapplicable to any Government purchases of bituminous coal because of the exemption provided by Section 9, 41 U. S. C. 42, which reads in part (Pet. App. 11a):

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[1] 41 U. S. C. 43a, 66 Stat. 308.

> This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market * * *.

The claim to this exemption admittedly depended upon petitioners' contention that the long-standing consistent administrative construction of the exemption was an erroneous interpretation of the statute. The administrative construction was contained in a formal separate regulation, applicable generally to all industries subject to the Act, which, interpreting the exemption as applicable only to such purchases as the *Government* usually makes in the open market, limited the exemption to the two types of purchases which constitute the usual method of open market procurement by the Government, *i. e.*:

> Where the contracting officer is authorized by the express language of a statute to purchase "in the open market," or where a purchase of articles, supplies, materials or equipment either in being or virtually so, is made without advertising for bids under circumstances bringing such purchase within the exception to the General Purchase Statute, R. S. 3709, that is, where immediate delivery is required by public exigency. [Section 201.2 (a), General Regulations under the Walsh-Healey Public Contracts Act, 41 CFR 201.2 (a), Pet. App. 12a.]

The Secretary ruled that the petitioners' challenge of this interpretation was not a matter properly raised in the wage determination proceeding, since the pro-

ceeding was concerned only with fact-finding as to wages, and that the application of the "open market" exemption could only be decided on a case-by-case basis, depending on the terms and circumstances of the particular contracts (R. 11). Extensive evidence was then taken on the question of the "prevailing minimum wages" in the industry, which resulted in the wage determination involved in this case.

Petitioners' complaint in this action for judicial review of the wage determination, under Section 10 (b) of the Act (the Fulbright Amendment), challenged the validity of the wage determination on a variety of grounds, including the disposition of their claim that the Secretary had no jurisdiction by reason of the statutory "open market" exemption. The amended complaint specifically alleged that "in making his determination for the Bituminous Coal Industry," the Secretary had "in effect determined" that the "open market" exemption of Section 9 was not applicable to bituminous coal purchases by the Government (R. 73). In the Court of Appeals, petitioners affirmatively contended that the court should decide the issue of the validity of the Secretary's regulation interpreting the exemption "as a matter of law," asserting that though the Secretary's rulings in the wage determination proceeding "were couched in terms of a refusal to decide whether Regulation 201.2 (a) was a correct interpretation of Section 9, their practical effect was a decision on the merits of the regulation" whereby "the applicability issue was raised and decided adversely at the administrative level, * * * so that the issue is ripe for [judicial]

review" under Section 10 (b) of the Fulbright Amendment (see Appellants' Brief in the C. A. D. C., pp. 20–21, 23).

The District Court granted judgment for the Secretary, declaring the wage determination "to be in all respect valid" (R. 85). The Court of Appeals affirmed, on the ground that, "on the merits," there was no error in the Secretary's interpretation of the "open market" exemption. The court specifically rejected petitioners' contentions "that the open market provision exempts bituminous coal from the Act, or that error otherwise impairs the validity of the Secretary's determination or of the District Court's judgment" (Pet. App. 3a–4a).

Petitioners state (Pet. 5) that the Court of Appeals held that "though the Secretary erred in ruling that the 'open market' exemption issue could not be raised by Petitioners in the administrative proceeding," the claimed exemption did not exist as a matter of statutory construction. But while the court disagreed with the Secretary's argument that judicial review of the "open market" issue was not appropriate *in this action* (the Secretary's view being that this issue related to the applicability of the *Act* rather than to the "applicability of * * * such wage determination"), there is nothing in the opinion holding that the Secretary erred in any ruling "in the administrative proceeding." On the contrary, the court decided the "open market" issue on the basis that petitioners themselves had presented it, as a question "of statutory interpretation," judicial disposition of which did not depend upon "an administrative hear-

ing upon the applicability of the exemption" (Pet. App. 3a, fn. 4). Petitioners also err in stating that the Court of Appeals "did not expressly uphold the validity of the Regulation [administrative interpretation] as such * * *" (Pet. 5). In response to petitioners' own explicit presentation of the "open market" issue, on the appeal, as being solely the question whether the Secretary's *"regulation* interpreting the exemption is correct as a matter of law" (Appellants' Brief in the C. A. D. C., p. 20, and "Questions Presented," p. (i), emphasis added), the court did sustain the regulation. The reasoning of the opinion leaves no doubt of this. It is directed entirely to the terms and purposes of the statute and to the legislative history bearing on the validity of the Secretary's interpretation. The court ruled (Pet. App. 4a, 6a) that, although the language of the exemption "considered alone" might be ambiguous, this language in the context of the whole statute and its purposes, together with the "historical, legislative, and administrative material bearing on the problem", resolved any ambiguity in favor of the Secretary's interpretation.

ARGUMENT

The unanimous decision of the Court of Appeals, upholding the long-standing administrative interpretation of the "open market" exemption of the Walsh-Healey (Public Contracts) Act, which Congress has accepted and declined to change through the years, is so clearly correct that review by this Court is not at all necessary. Admittedly, the decision is not in con-

flict with that of any other court of appeals, or of any district court. Although the question is unquestionably one of national importance, in the sense that a contrary decision would so restrict the scope of the Walsh-Healey Act as virtually to nullify it, we believe that the decision of the Court of Appeals adequately, as well as correctly, resolves any current or impending problem.

1. The court's interpretation of the "open market" exemption is clearly correct. As is convincingly demonstrated by the opinion below, any ambiguity in the bare language of the exemption provision is resolved by "the context of the whole statute" and by consideration of the statutory purposes and the long post-legislative and administrative history.

The fact that the administrative interpretation was adopted over 20 years ago by the officials "charged with the responsibility of setting its machinery in motion * * * while * * * yet untried and new" (*United States* v. *American Trucking Assns.*, 310 U. S. 534, 549), has been consistently adhered to by the successive Secretaries of Labor and all other interested Government procurement agencies concerned with the application of the Act, and has been continuously accepted by the Congress for purposes of annual appropriations, sufficiently establishes, we submit, the soundness of the decision. *United States* v. *American Trucking Assns., id.* at 544; *Brooks* v. *Dewar*, 313 U. S. 354, 361; *Alstate Construction Company* v. *Durkin*, 345 U. S. 13, 17; *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 270. These considera-

tions are especially controlling in any judicial review of the administration of the Public Contracts Act which regulates only Government, not private, business (see *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 at 127, 129). As this Court observed in the *Lukens Steel* case (310 U. S. 113 at 127–128):

> * * * Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties "require an interpretation of the law." Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government.

There is thus particularly compelling reason for the conclusion that the courts should "decline to repudiate an administrative interpretation of the Act which Congress refused to repudiate after being repeatedly urged to do so." *Alstate*, 345 U. S. at 17.

Petitioners' view of the "plain meaning" of the statutory language and of the "unambiguous" legislative history at the time of its enactment (Pet. 11) has not been shared either by the Congress, by any of the Government officials responsible for the administration of the Act, or by either of the courts below. The statute, on its face, as the opinion below specifically shows, is replete with other provisions inconsistent with petitioners' sweeping interpretation of this exemption—an interpretation which would exclude from the Walsh-Healey Act *seven-eighths* of the

Government procurement clearly within the scope of the basic purposes of the Act.[1a]

And that the "plain meaning" did not require or warrant such an expansive interpretation of this exemption was recognized at the outset by Congress when called upon to make the first appropriation for the administration of the Act. The specific administrative interpretation here in issue was then deliberately accepted by the Congress as a basis for supplying funds for the Act's administration. In the first appropriation for the Labor Department's administration of the Act, the pertinent Committee noticed that, if an expansive interpretation of the exemption like the one advanced by the petitioners were adopted, the Act would apply to only one-eighth of the Government procurement to which it applies under the interpretation of the Secretary of Labor. So that Congress might make appropriation in an amount commensurate with the administrative and enforcement work involved, the Committee inquired of the Comptroller General which of these two interpretations should be accepted by the Congress for the purpose of the annual appropriation (H. Rept. 433, 75th Cong., 1st Sess., p. 25). Addressing himself to

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[1a] The report on the bill making the first appropriation for administration of the Act stated that if such a broad "construction had been placed upon the words of the act the field in which the statute would operate would be considerably narrowed. (It was testified that whereas between 3,500 and 4,000 contracts are now covered by the act, such a construction of the law would reduce the number of contracts to be considered to about 500)." H. Rept. No. 433 on Appropriations Bill for Fiscal Year 1938 (75th Cong., 1st Sess.), p. 25; 81 Cong. Rec. 2771.

the interpretation which petitioners urge, the Comptroller General concluded (81 Cong. Rec. 2771):

> To permit such exemptions under the present act, which relates only to supply contracts, would so restrict its operation as practically to nullify its other provisions. Consequently, as between that interpretation and the one adopted by the Secretary of Labor, I felt compelled to accept the latter—the plain terms of the provision being such as to admit of only one or the other of those two interpretations.
>
> Accordingly I have to advise that unless and until the matter be clarified by further legislation, I am constrained to concur in the interpretation placed on the provision by the Department of Labor.

As pointed out in the opinion below (see Pet. App. 6a, fn. 5), after the receipt of the Comptroller General's opinion, the chairman of the House Appropriations Committee moved to restore a cut which had been made in the appropriations for the administration of the Walsh-Healey Act on the specific ground that the effect of the Comptroller General's decision "is to considerably expand the activities of this division over what would have been required had the interpretation favored by our subcommittee been placed on the law" (81 Cong. Rec. 2770). Congressman Healey (the main sponsor of the Act, which bears his name) expressed his gratification "that the doubts of the subcommittee on appropriations concerning the proper interpretation of section 9 of this act have been cleared by the ruling of the Comptroller General," and stated that the opinions of the

Comptroller General and of the Department of Labor "in my judgment, clearly reflect the intent and purpose of Congress in the passage of this act" (*id.* at 2772).[2] This amendment to restore the cut in appropriation was then adopted by the House (81 Cong. Rec. 2773) and became law (50 Stat. 299 (1937)).

The interpretation thus adopted has been followed ever since. In the intervening years, the courts have been called upon many times to enforce the several provisions of the Act, almost invariably where petitioners' interpretation of the "open market" exemption would have been a complete defense. However, there evidently has been so little confidence in the soundness of petitioners' interpretation that in none of these numerous cases has the "open market" exemption even been mentioned, although they involved commonplace articles that can usually be bought in the open market by purchasers generally.[3]

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[2] This clear-cut statement by Congressman Healey refutes petitioners' reliance on their interpretation of Congressman Healey's earlier statements which patently do not afford any clarification of this question (Pet. 12–13).

[3] See *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (iron and steel); *United States* v. *Smoler Bros.*, 187 F. 2d 29 (C. A. 7—women's cotton wearing apparel); *United States* v. *Hudgins-Dize Co.*, 83 F. Supp. 593 (E. D. Va.—tents and haversacks); *United States* v. *Sweet Briar, Inc.*, 92 F. Supp. 777 (W. D. S. C.—cotton underwear and shorts); *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 (shoes); *United States* v. *Ozmer*, 181 F. 2d 508 (C. A. 5—lumber); *United States* v. *Lovknit Mfg. Co.*, 189 F. 2d 454 (C. A. 5), certiorari denied, 342 U. S. 896, rehearing denied, 342 U. S. 915 (mosquito bars); *United States* v. *Craddock-Terry Shoe Corp.*, 178 F. 2d 760 (C. A. 4—shoes); *United States* v. *Harp*, 173 F. 2d 761 (C. A. 10), certiorari denied, 338 U. S. 816 (canned poultry);

Each of the several Annual Reports of the Secretary of Labor to the Congress made thereafter, and each Annual Report made by the Administrator of the Public Contracts Division, plainly reveals that the Walsh-Healey Act was being applied to purchases of ordinary commodities such as the public usually makes in the open market.[4]

Lance v. *United States*, 190 F. 2d 204 (C. A. 4), certiorari denied, 342 U. S. 896, rehearing denied, 342 U. S. 915 (peanut butter crackers); *Unexcelled Chemical Corp.* v. *United States*, 345 U. S. 59 (flares and fuses); *Reynolds Corp.* v. *Morse*, 174 F. 2d 159 (C. A. D. C.—aluminum); *United States* v. *W. H. Kistler Co.*, 200 F. 2d 805 (C. A. 10—books); *United States* v. *Warsaw Elevator Co.*, 213 F. 2d 517 (C. A. 2—hinges and screws); *Ready-Mix Concrete* v. *United States*, 130 F. Supp. 390 (C. Cls.—crushed stone and gravel); *In re Thrift Packing Co.*, 100 F. Supp. 907 (N. D. Texas—canned meat, hash, and chili con carne); *United States* v. *Standard Pharmical Co.*, 17 Labor Cases Para. 65,460 (S. D. Ill.—fruit powder); *United States* v. *Old Dominion Mfg. Co.*, 8 WH Cases 616 (E. D. Va.—mattress covers and tents); *United States* v. *United Distillers Products Corp.*, 156 F. 2d 872 (C. A. 2—alcohol); *United States* v. *Hedstrom*, 8 WH Cases 302 (N. D. Ill.—lighting fixtures); *United States* v. *Davis, d/b/a Textile Products Industries*, 9 WH Cases 340 (N. D. Ill.—cotton duck); *United States* v. *Rippetoe*, 17 Labor Cases Para. 65,324 (E. D. S. C.—tents); *United States* v. *B. & W. Sportswear*, 53 F. Supp. 785 (E. D. N. Y.)—jackets); *United States* v. *Standard Ice Co.*, 18 Labor Cases Para. 65,798 (D. C. Ark.—ice); *United States* v. *Duro-Wear Shirt Co.*, 22 Labor Cases Para. 67,224 (D. Conn.—shirts); *United States* v. *Garfunkel Makers*, 199 F. 2d 759 (C. A. 2—hats and caps); *United States* v. *Negri, d/b/a General Dairy Products Co.*, 22 Labor Cases Para. 67,297 (D. Minn.—dried milk); *Ready-Mix Concrete Co., Ltd.* v. *United States*, C. Cls. No. 49279, decided January 15, 1958 (ready-mix concrete).

[4] Annual Report of the Secretary of Labor, Fiscal Year Ended June 30, 1936, at 6; *Ibid.*, 1937, at 34–40; *Ibid.*, 1938, at 2, 16–53; *Ibid.*, 1939, at 6, 35–44; *Ibid.*, 1940, at 5, 32–49;

Despite efforts to write petitioners' interpretation into the statute by amendment (as the Comptroller General's 1937 opinion suggested should be done before doubts could reasonably be resolved against the Secretary's interpretation), Congress has refused to amend the Act. Just as the Fulbright Amendment involved rejection of a proposal to write expressly into the Act a definition of "locality" different from the long-standing administrative interpretation,[5] so was there, at the same time and under the same conditions, a like unsuccessful attempt to write expressly into legislation a proposal designed directly to accomplish petitioners' present objective as to the "open market" exemption. Senator Fulbright had offered a proposal[6] to amend and substitute for the present "open market" purchase language the following:

> This Act shall not apply to purchases of such materials, supplies, articles, or equipment of standard type and construction as are usually

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Ibid., 1941, at 13–14, 27–51; *Ibid.*, 1942, at 34–37; *Ibid.*, 1943, at 36–43; *Ibid.*, 1944, at 61–71; *Ibid.*, 1945, at 8–13; *Ibid.*, 1946, at 177–196; *Ibid.*, 1947, at 96–104; *Ibid.*, 1948, at 85–92; *Ibid.*, 1949, at 86–96; *Ibid.*, 1950, at 48–56, 193–318; *Ibid.*, 1951, at 134–135; *Ibid.*, 1952, at 16–18, 103–104; *Ibid.*, 1953, at 81–82; *Ibid.*, 1954, at 25, 29–30.

[5] See *Covington Mills et al.* v. *Mitchell*, 225 F. 2d 506 (C. A. D. C.); certiorari denied, 350 U. S. 1002; *Alabama Mills, Inc.* v. *Mitchell*, 244 F. 2d 21 (C. A. D. C.), certiorari denied, 355 U. S. 834.

[6] See Senator Fulbright's proposed amendment to Section 9, Hearings on Defense Production Act Amendments of 1952 before the Senate Committee on Banking and Currency, on S. 2594 and S. 2645, 82nd Cong., 2d Sess., Part 5, p. 2473.

> sold in the open market to purchasers generally, regardless of the method of procurement used by the Government.

When certain Senators proposed to offer an amendment to strike the entire Fulbright proposals, Senator Fulbright offered the compromise measure (Section 10 (c), Pet. App. 12a) which was simply designed "to leave to the courts the decision as to what is the proper interpretation to be made of the Act" (98 Cong. Rec. 6529). He admitted that this compromise proposal—

> does not constitute any change whatever in the substantive law. In view of the long history of the Walsh-Healey Act—in other words, it has been on the statute books since 1936—I realize that there will be some resistance, no matter whether I am correct with respect to my interpretation of the original intent of Congress. Nevertheless, I am perfectly willing to allow the courts to determine the correctness of the interpretation of the Act, as made by the Secretary of Labor. [*Id.* at 6530.]

Thus, while the Fulbright Amendment as finally enacted into law provided for court review of the administrative construction of "open market," it significantly failed to include the proposal to change the present "open market" as well as the "locality" language as it had been administratively interpreted. The Amendment was obviously designed by its sponsor to refer these questions to the courts on the basis of the original intent of Congress, but it is plain that it was a compromise with other members of Congress who felt that the existing administrative construction

was correct and who undoubtedly expected weight to be attached to the 16 years of administrative and legislative experience under the Act.

The importance of this long history of administrative practice and legislative acquiescence cannot be minimized by characterizing it as a "bootstrap" argument because "the Secretary's interpretation was immune from attack" until the Fulbright Amendment in 1952 (Pet. 10). The fact that the interpretation may have been immune from challenge in the courts, far from affording reason for its judicial repudiation now, is added reason for its acceptance. For, during all of these years when the administrative interpretation was certainly not immune from Congressional review, Congress deliberately allowed the interpretation to become the established law. In these circumstances, such a substantive change in the law as would result from reversal of the long-standing administrative interpretation is clearly a decision to be made by Congress rather than by the courts.

2. The "in limine" reason assigned by petitioners as supporting the grant of the writ—that the Secretary had not ruled, in the administrative proceeding, on the content of the "open market" exemption—is entirely without substance. Not only is it premised on petitioners' mistaken assertion that the decision below decided an issue "in the absence of a definite ruling thereon by the Secretary" (Pet. 7), but it is directly contradictory to petitioners' own insistence before the Court of Appeals that the "practical effect" of the Secretary's wage determination was "a decision on the merits of the regulation [interpreting

the open market exemption]" which "decided adversely at the administrative level" the issue of "applicability" of the wage determination raised by petitioners in this action (see the Statement, *supra,* pp. 4–5). While it was the Secretary's view that his separate regulation interpreting the "open market" exemption was not reviewable in an action for judicial review of the wage determination, he did not deny that the practical effect of the separate regulation was a decision that this exemption did not exclude all purchases of bituminous coal from the Act, or, therefore, from the application of the wage determination. As the Court of Appeals' opinion indicates (Pet. App. 3a, fn. 4), petitioners themselves conceded below that there was no need to remand for an administrative hearing on the applicability of the exception. It was on this undeniable premise—*i. e.,* that the "wage determination is purportedly applicable" to the bituminous coal industry (see Pet. App. 3a)—that the Court of Appeals, accepting petitioners' own affirmation that the issue had already been "raised and decided adversely at the administrative level" (see the Statement, *supra,* p. 4), concluded that the issue was reviewable in this proceeding and decided it.

In other words, as petitioners themselves presented the issue on appeal, it was solely whether the "open market" exemption in Section 9 of the Act "would apply to all government procurement in this industry" (Appellants' Brief in the C. A. D. C., p. 24), which, as the Court of Appeals noted, was simply a question of statutory interpretation (Pet. App. 3a, fn. 4). Whether or not this question of statutory interpre-

tation was determined in the *wage determination* proceeding, it had definitely been administratively determined "in the first instance" by the earlier general regulation issued by the Secretary (*supra*, p. 3). In these circumstances, petitioners' charge (Pet. 7) that the Court of Appeals violated the "salutary rule that the [administrative] agency should make the determination in the first instance" is, to say the least, surprising. Moreover, even if the point had more substance, it would not be available to petitioners here since they deliberately did not raise it below.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
PAUL A. SWEENEY,
Attorney.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
Department of Labor.

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